TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 555

ROBERT V. H. SUGDEN AND JEAN S. SUGDEN, HIS WIFE, PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 6, 1955

CERTIORARI GRANTED JANUARY 30, 1956

No. 14405

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ROBERT V. H. SUGDEN and JEAN S. SUGDEN,
Appellees.

Transcript of Record

Appeals from the United States District Court for the District of Arizona

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellees.

In the United States District Court for the District of Arizona

No. C-11554—Phoenix

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT V. H. SUGDEN and JEAN S. SUGDEN, Defendants.

INDICTMENT

Viol. 18 USC 371 (Conspiracy to violate Immigration Laws)

The Grand Jury Charges:

Beginning on or about August 23, 1953, and continuing to and including September 18, 1953, in the County of Yuma, Arizona, in the State and District of Arizona, defendants Robert V. H. Sugden and Jean S. Sugden, and co-conspirators, not named as defendants, Robert Sommers, George Matthews, Horace Billingsley, Beal Billingsley and Lawrence Gerhart did knowingly, wilfully, feloniously, and in violation of 18 U.S.C. 371, agree, confederate, and conspire together to commit offenses against the United States, to-wit, did wilfully and knowingly conceal and shield from detection, and attempt to conceal and shield from detection, aliens who were not duly admitted into the United States of America by an Immigration officer or not lawfully entitled to enter or reside within the United States

of America under the terms of the Immigration and Nationality Act of 1952 (Public Law 414) or any other law relating to the immigration or expulsion of aliens, in violation of 8 U.S.C. 1324(a)(3).

The object of said conspiracy was to be accomplished as follows: The defendant Robert V. H. Sugden did cause to be installed in his home two-way radio equipment, from which his wife, Jean S. Sugden, did, at various times during the conspiracy dates as hereinbefore set forth, broadcast to radio equipped mobile units driven by defendant Robert V. H. Sugden and co-conspirators Robert Sommers, George Matthews, Horace Billingsley, Beal Billingsley and Lawrence Gerhart warnings that Immigration officers were enroute to cotton fields where the aforementioned described aliens were working, whereupon the aforementioned defendant and co-conspirators, who were driving the mobile units, would proceed to the cotton fields and conceal and shield from detection, and attempt to conceal and shield from detection, the aforementioned described aliens from Immigration officers.

To effectuate and in furtherance of the object of said conspiracy, the said defendants and co-conspirators did commit, among others, the following overt acts:

Overt Act No. 1

On or about August 23, 1953, in Yuma County, Arizona, co-conspirator Horace Billingsley did signal and shout to aliens, not duly admitted to the United States by an Immigration officer and not lawfully entitled to enter or reside within the

United States of America, that Immigration officers were *nearly,* and said aliens did thereupon conceal themselves from said officers.

Overt Act No. 2

On or about August 23, 1953, in Yuma County, Arizona, co-conspirator Lawrence Gerhart did place a person in a certain place for the purpose of watching for Immigration officers, after having received a warning that Immigration officers were in the general area.

Overt Act No. 3

On or about August 24, 1953, in Yuma County, Arizona, co-conspirator George Matthew did warn aliens, not duly admitted to the United States of America by an Immigration officer and not lawfully entitled to enter or reside within the United States of America, that Immigration officers were enroute to the cotton fields where said aliens were working and thereby did conceal and attempt to shield said aliens from detection.

Overt Act No. 4

On or about September 2, 1953, in Yuma County, Arizona, the defendant Robert V. H. Sugden did warn aliens not duly admitted to the United States of America by an Immigration officer and not lawfully entitled to enter or reside within the United States of America, that Immigration officers were approaching, whereupon said aliens did then and there conceal themselves from said officers.

Overt Act No. 5

On or about the following dates, in Yuma County, Arizona, to-wit, September 4, 1953, September 5, 1953, September 9, 1953, September 10, 1953, September 16, 1953, and September 18, 1953, the defendant Jean S. Sugden did broadcast over radio telephone base station KOG-285 that Immigration officers were enroute to the cotton fields for the purpose of causing aliens not lawfully admitted to the United States of America by an Immigration officer and not lawfully entitled to enter or reside within the United States of America to conceal themselves from said officers.

Overt Act No. 6

On or about September 4, 1953, in Yuma County, Arizona, co-conspirator Robert Sommers did broadcast a warning over a radio telephone transmitter installed in a mobile unit to defendant Jean S. Sugden, who was operating radio telephone base station KOG-285, that Immigration officers were in the vicinity and that he would advise said defendant Jean S. Sugden of the actions of said Immigration officers.

Overt Act No. 7

On or about September 5, 1953, in Yuma County, Arizona, the defendant Jean S. Sugden did broadcast a warning over radio telephone base station KOG-285 to several radio equipped mobile units, that Immigration officers were going to raid the fields.

Overt Act No. 8

On or about September 5, 1953, in Yuma County, Arizona, the defendant Robert V. H. Sugden caused a person to go upon a hill for the purpose of keeping watch for Immigration officers.

Overt Act No. 9

On or about September 17, 1953, in Yuma County, Arizona, the defendant Robert V. H. Sugden told aliens not duly admitted to the United States of America by an Immigration officer and not lawfully entitled to enter or reside within the United States of America to conceal themselves when Immigration officers arrived.

A True Bill:

/s/ J. CLAYTON BAIN,
Deputy Foreman
/s/ EDWARD W. SCRUGGS,
United States Attorney

[Endorsed]: Filed October 7, 1953.

In the United States District Court for the District of Arizona

No. C-11555—Phoenix

UNITED STATES OF AMERICA, Plaintiff,

vs.

ROBERT V. H. SUGDEN, Defendant.

INDICTMENT

Viol.: 8 USC 1324(a) (3) (Conceal aliens)

The Grand Jury Charges:

Count One

On or about September 5, 1953, in Yuma County, Arizona, District of Arizona, the defendant Robert V. H. Sugden, did wilfully, knowingly and feloniously conceal and shield from detection, and attempt to conceal and shield from detection, an alien, to-wit, Pedro Madrigal-Ortiz, which alien was not duly admitted by an Immigration officer and not lawfully entitled to enter or reside within the United States of America, in violation of 8 U.S.C. 1324(a)(3).

* * * * *

Count Six

On or about September 10, 1953, in Yuma County, Arizona, District of Arizona, the defendant Robert V. H. Sugden, did wilfully, knowingly and feloniously conceal and shield from detection, and attempt to conceal and shield from detection, an alien, to-wit, Juan Sanchez-Ramirez, which alien was not duly admitted by an Immigration officer

and not lawfully entitled to enter or reside within the United States of America, in violation of 8 U.S.C. 1324(a)(3).

* * * * *

Count Eight

On or about September 10, 1953, in Yuma County, Arizona, District of Arizona, the defendant Robert V. H. Sugden, did wilfully, knowingly and feloniously conceal and shield from detection, an alien, to-wit: Manuel Martinez-Palomino, which alien was not duly admitted by an Immigration officer and not lawfully entitled to enter or reside within the United States of America, in violation of 8 U.S.C. 1324(a)(3).

* * * * *

Count Twelve

On or about September 17, 1953, in Yuma County, Arizona, District of Arizona, the defendant Robert V. H. Sugden, did wilfully, knowingly and feloniously conceal and shield from detection, an alien, to-wit, Raul Serrano-Rodarte, which alien was not duly admitted by an Immigration officer and not lawfully entitled to enter or reside within the United States of America, in violation of 8 U.S.C. 1324 (a) (3).

* * * * *

Count Sixteen

On or about September 18, 1953, in Yuma County, Arizona, District of Arizona, the defendant Robert V. H. Sugden, did wilfully, knowingly and feloniously conceal and shield from detection, an alien, to-wit: Jose Rodriguez-Galindo, which alien

was not duly admitted by an Immigration officer and not lawfully entitled to enter or reside within the United States of America, in violation of 8 U.S.C. 1324(a)(3).

* * * * *

A True Bill:

/s/ J. CLAYTON BAIN,
Deputy Foreman
/s/ EDWARD W. SCRUGGS,
United States Attorney

[Endorsed]: Filed October 7, 1953.

In the United States District Court for the District of Arizona

No. C-11554—United States of America, Plaintiff, vs. Robert V. H. Sugden and Jean S. Sugden, Defendants.

No. C-11555—United States of America, Plaintiff, vs. Robert V. H. Sugden, Defendant.

No. C-11557—United States of America, Plaintiff, vs. Jean S. Sugden, Defendant.

No. C-11992—United States of America, Plaintiff, vs. Robert V. H. Sugden, Defendant.

MOTION TO SUPPRESS

Come Now the defendants in each of the above entitled and numbered causes and respectfully move the Court that an order be entered herein suppressing all records and transcripts of inter-

cepted radio communications and messages intercepted and recorded by the government of the United States emanating from any of the radio communications apparatus described in the various indictments filed herein and suppress all evidence of the government of the United States obtained by the use of such messages so intercepted, and to suppress the testimony of any witness obtained in the first instance by the government through the use of such messages and that of any witness whose recollection was refreshed or aided by such messages or through the use of such messages by the government of the United States.

These defendants further move the Court to direct and order that the United States Attorney or the Assistant United States Attorney engaged in the prosecution of each of these causes shall make no use of any information directly or indirectly obtained by the government through the use of any communications so intercepted, and direct and require that no questions may be framed and be put to any witness by the government of the United States if the information which forms the basis and reason for the posing of such question or questions was derived directly or indirectly by the government of the United States through any such intercepted communication.

In support of the foregoing motion, these defendants and each of them respectfully represent that they are informed and believe and therefore state that during the period within the dates set

forth in the various indictments filed herein the government of the United States had stationed in the Yuma area within which these defendants live, and were then carrying on their business operations equipment for the purpose of listening in, intercepting and tapping radio communication facilities of these defendants, which said interception and tapping was without the consent of these defendants and each of them, and an invasion of their privacy, constituted an unlawful search and seizure contrary to and in violation of the Fourth Amendment to the United States Constitution and in violation of the Federal Communications Act of 1934, Section 605 thereof; these defendants further represent they have never consented to such illegal interception and tapping of their communication system and the divulging of any messages so intercepted and the same was done without their consent and in violation of law.

Defendants, upon information and belief allege that information so obtained was used by the government in obtaining the names of witnesses to be called by the government, in interrogating such witnesses and in obtaining from such witnesses statements and admissions as to facts from which the government seeks to draw inferences adverse to these defendants. Defendants further allege, upon information and belief, that transcripts of said intercepted messages have been delivered to and have been in the possession of the United States Attorney and used by him in trial preparation and for

the purpose of obtaining information to be used by him upon the trial of these actions.

Respectfully submitted,

/s/ BRYANT W. JONES,
SNELL & WILMER,
/s/ By MARK WILMER,
Attorneys for Defendants.

Duly Verified.

[Endorsed]: Filed March 25, 1954.

[Title of District Court and Cause No. C-11554.]

MINUTE ENTRY OF NOV. 23, 1953

Honorable Dave W. Ling, United States District Judge, presiding.

This case comes on regularly for arraignment this date and for hearing on defendants' Motion to Dismiss, Motion to Strike and Motion for Bill of Particulars. William A. Holohan, Esq., Assistant United States Attorney, appears for the Government. The defendants, Robert V. H. Sugden and Jean S. Sugden, are present in person with their counsel Mark Wilmer, Esq.

Said motions are now argued by respective counsel, and

It Is Ordered that the record show the said motions are submitted.

The defendants are now duly arraigned, and waive the reading of the indictment. A copy of the

Indictment is handed to each of the defendants. Each of the said defendants pleads not guilty, which pleas are now duly entered.

It Is Ordered that this case be and it is set for trial Wednesday, February 3, 1954 at 10:00 o'clock a.m. subject to ruling on said motions.

[Title of District Court and Cause No. C-11555.]

MINUTE ENTRY OF NOV. 23, 1953

Honorable Dave W. Ling, United States District Judge, presiding.

This case comes on regularly for arraignment this date and for hearing on defendant's Motion to Dismiss and Motion for Bill of Particulars. William A. Holohan, Esq., Assistant United States Attorney, appears for the Government. The defendant, Robert V. H. Sugden, is present in person with his counsel Mark Wilmer, Esq.

Said motions are now argued by respective counsel and,

It Is Ordered that each of said motions be and it is denied.

The defendant is now duly arraigned, and waives the reading of the Indictment. A copy of the Indictment is handed to him. The defendant's plea is not guilty, which plea is now duly entered and,

It is Ordered that this case be and it is set for trial Wednesday, February 3, 1954, at 10:00 o'clock a.m.

[Title of District Court and Causes C-11554-11555.]

MINUTE ENTRY OF MARCH 25, 1954

Honorable Dave W. Ling, United States District Judge, presiding.

These cases come on regularly for trial this day. William A. Holohan, Esq., Assistant United States Attorney, appears for the Government. The defendants, Robert V. H. Sugden and Jean S. Sugden are present in person with their counsel, Mark Wilmer and Bryant Jones, Esq.

It Is Ordered that cases numbered C-11554 and 11555 be consolidated for trial.

On motion of said counsel for the Government, pursuant to plaintiff's Motion to Dismiss heretofore filed in C-11555,

It Is Ordered that Counts two, three, four, five, seven, nine, ten, eleven, thirteen, fourteen, fifteen and seventeen of the Indictment in C-11555 are dismissed.

It Is Ordered that these cases be continued until 3:00 o'clock p.m. for trial, to which time all veniremen, defendants, witnesses and counsel are excused.

Subsequently at 3:35 o'clock p.m., respective counsel aforesaid, are present in chambers. On motion of said counsel for the Government,

It Is Ordered that Sidney Broffman, Esq., be entered as associate counsel for the Government.

Counsel for the defendants now present and file defendants' Motion to Suppress which is now argued by counsel.

It Is Ordered that said Motion to Suppress is denied at this time, subject to renewal at a later date.

Subsequently, at 3:50 o'clock p.m., the defendants and all counsel are present in open court.

It Is Ordered that all veniremen be excused until March 26, 1954 at 11:00 o'clock a.m. and that these cases be continued for trial until said time, and that the defendants' Motion to Suppress be continued for further hearing until March 26, 1954 at 9:30 o'clock a.m.

[Title of District Court and Causes C-11554-11555.]

MINUTE ENTRY OF MARCH 26, 1954

Honorable Dave W. Ling, United States District Judge, presiding.

These cases come on regularly for trial this day. William A. Holohan, Esquire, and Sidney Broffman, Esquire, appear for the Government. The defendants are present in person with their counsel, Mark Wilmer, Esquire, and Bryant Jones, Esquire. The Government announces ready for trial. The defendants announce not ready.

All veniremen in attendance are now excused until Wednesday, March 31, 1954, at 10:00 o'clock a.m.

Further hearing is now had on the defendants' motion to suppress. Robert J. Stratton is sworn and cross-examined as an adverse party. Horace

Billingsley, Lawrence Gearheart, Beale Billingsley, Robert Sommers, Robert V. H. Sugden, Jean S. Sugden are sworn and examined on behalf of the defendants. Theodore Keiling is sworn and examined for the Government. Government's exhibits 1 and 2, Applications for radio operator license or permit, and exhibit 3, Certified copy construction permit and license, admitted in evidence.

Said motion to suppress is submitted to the Court.

It Is Ordered that said Motion to Suppress is granted, and

It Is Ordered that the indictment in case No. C-11554 Phoenix and the indictment in case No. C 1555 Phoenix be and they are dismissed.

[Title of District Court and Causes C-11554-11555.]

MINUTE ENTRY OF JUNE 2, 1954

Honorable James A Walsh, United States District Judge, Presiding at Tucson.

On Motion of Robert Roylston, Esq., Assistant United States Attorney, It Is Ordered that the plaintiff's time for filing the Record on Appeal and docketing the appeal, taken April 23, 1954, in the United States Court of Appeals for the Ninth Circuit, be and it is extended to and including June 16, 1954.

[Title of District Court and Causes C-11554-11555.]

MINUTE ENTRY OF JUNE 9, 1954

Honorable Dave W. Ling, United States District Judge, presiding.

On motion of William A. Holohan, Esq., Assistant United States Attorney,

It Is Ordered that the plaintiff's time to file the Record on Appeal and Docket the appeals herein in the United States Court of Appeals for the Ninth Circuit, be and it is extended to and including June 30, 1954.

[Title of District Court and Cause No. C-11554.]

NOTICE OF APPEAL

The United States of America, by Jack D. H. Hays, United States Attorney for the District of Arizona, and William A. Holohan, Assistant United States Attorney for said District, whose address is 204 U. S. Court House, Phoenix, Arizona, hereby gives notice of appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled matter.

The defendants, Robert V. H. Sugden and Jean S. Sugden, were indicted for conspiring to violate the Immigration laws of the United States by setting up a radio station in the defendants' home, which radio station was used to warn the defendants and their co-conspirators of the approach of

Immigration officers so that the defendants and the co-conspirators could conceal aliens unlawfully in this country; that in furtherance of the alleged conspiracy, certain overt acts were set forth which included the use of the radio in the defendants' home on dates set forth in the month of September, 1953.

On the 26th day of March, 1954, the United States District Court for the District of Arizona entered an order granting the defendants' motion to suppress evidence which had been obtained by the plaintiff, United States of America, through the use of monitoring apparatus used by the Federal Communication Commission to listen in on radio conversations had by the defendants Robert V. H. Sugden and Jean S. Sugden with other persons; on the same date above stated the Court also entered an order dismissing the indictment in the above-entitled matter.

Plaintiff, United States of America, hereby appeals from the order of the Court granting the defendants' motion to suppress evidence and from the order of the Court granting the defendants' motion to dismiss the indictment.

Dated at Phoenix, Arizona, this 23rd day of April, 1954.

JACK D. H. HAYS,
United States Attorney
/s/ WILLIAM A. HOLOHAN,
Assistant U. S. Attorney

[Endorsed]: Filed April 23, 1954.

[Title of District Court and Cause No. C-11555.]

NOTICE OF APPEAL

The United States of America, by Jack D. H. Hays, United States Attorney for the District of Arizona, and William A. Holohan, Assistant United States Attorney for said District, whose address is 204 U. S. Court House, Phoenix, Arizona, hereby gives notice of appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled matter.

The defendant, Robert V. H. Sugden, was indicted for violating Title 8 U.S.C.A., Section 1324 (a)(3), by wilfully, knowingly and feloniously concealing and shielding from detection and attempting to conceal and shield from detection, an alien, to-wit, Pedro Madrigal-Ortiz, which alien was not duly admitted by an Immigration officer and not lawfully entitled to enter or reside within the United States of America; and four other counts which are identical with the count set out verbatim with the above, with the exception that the alien concealed in each count is named and is a different individual.

On the 26th day of March, 1954, the United States District Court for the District of Arizona entered an order granting the defendant's motion to suppress evidence which had been obtained by the plaintiff, United States of America, through the use of monitoring apparatus used by the Federal Communication Commission to listen in on

radio conversations had by the defendant Robert V. H. Sugden with other persons; on the same date above stated the Court also entered an order dismissing the indictment in the above-entitled matter.

Plaintiff, United States of America, hereby appeals from the order of the Court granting the defendant's motion to suppress evidence and from the order of the Court granting the defendant's motion to dismiss the indictment.

Dated at Phoenix, Arizona, this 23rd day of April, 1954.

JACK D. H. HAYS,
United States Attorney
/s/ WILLIAM A. HOLOHAN,
Assistant U. S. Attorney

[Endorsed]: Filed April 23, 1954.

In the United States District Court for the District of Arizona

No. C-11554—Phoenix

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT V. H. SUGDEN and JEAN S. SUGDEN, Defendants.

ORDER TO SUPPRESS EVIDENCE AND TO DISMISS

This Cause coming on to be heard on motion of defendants to suppress evidence alleged to have been obtained by plaintiff while monitoring certain radio broadcasts of defendants, and defendants, through counsel, having moved in open Court to dismiss the indictment in this cause, and evidence having been presented by all parties,

Now, Therefore, the Court finds that plaintiff has obtained information and evidence by monitoring certain radio broadcasts of defendants, and that the information and evidence so obtained was presented to the Grand Jury which returned the indictment in this cause, and that plaintiff has used the information and evidence, obtained as aforedescribed, to question witnesses and otherwise prepare for trial, and, lastly, that plaintiff intends to rely on the aforedescribed information and evidence to prove its case against defendants,

Therefore, it is the ruling of this Court that all evidence and information gained as above described be suppressed in this cause, and it is the further ruling of this Court that the indictment in this cause be dismissed on the grounds and for the reason that the said indictment is tainted by the fact that it resulted from the use by the Grand Jury of illegally obtained information and evidence, and also by the fact that said indictment was returned by the Grand Jury after its consideration of the aforedescribed illegally obtained evidence; and a further grounds for dismissal is the fact that the government must use the aforedescribed evidence in order to prove its case against defendants.

Now, Therefore, It Is Ordered, Adjudged and Decreed that the indictment in the cause be dismissed.

/s/ DAVE W. LING,
Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed and Docketed May 5, 1954.

In the United States District Court for the District of Arizona

No. C-11555—Phoenix

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT V. H. SUGDEN, Defendant.

ORDER TO SUPPRESS EVIDENCE AND TO DISMISS

This Cause coming on to be heard on motion of defendant to suppress evidence alleged to have been obtained by plaintiff while monitoring certain radio broadcasts of defendant, and defendant, through counsel, having moved in open court to dismiss the indictment in this cause, and evidence having been presented by all parties;

Now, Therefore, the Court finds that plaintiff has obtained information and evidence by monitoring certain radio broadcasts of defendant, and that the information and evidence so obtained was presented to the Grand Jury which returned the indictment in this cause, and that plaintiff has used the information and evidence, obtained as afore-described, to question witnesses and otherwise prepare for trial, and, lastly, that plaintiff intends to rely on the afore-described information and evidence to prove its case against defendants;

Therefore, it is the ruling of this Court that all evidence and information gained as above described

be suppressed in this cause, and it is the further ruling of this Court that the indictment in this cause be dismissed on the grounds and for the reason that the said indictment is tainted by the fact that it resulted from the use by the Grand Jury of illegally obtained information and evidence, and also by the fact that said indictment was returned by the Grand Jury after its consideration of the afore-described illegally obtained evidence; and a further grounds for dismissal is the fact that the government must use the afore-described evidence in order to prove its case against defendants;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the indictment in this cause be dismissed.

/s/ DAVE W. LING,
Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed and Docketed May 5, 1954.

[Title of District Court and Cause No. C-11554.]

NOTICE OF APPEAL

The plaintiff and appellant, United States of America, is represented by Jack D. H. Hays, United States Attorney for the District of Arizona, and William A. Holohan, Assistant United States Attorney for said District, whose address is 204 U. S. Court House, Phoenix, Arizona.

Robert V. H. Sugden and Jean S. Sugden, defendants in the caption, were indicted for conspiracy to violate the immigration laws of the United

States, namely, Title 8 U.S.C.A. 1324(a)(3), by setting a radio station in the defendants' home and equipping defendants' pick-up trucks with two-way radio, and then defendants would warn each other and other co-conspirators of the approach of United States Immigration officers so that alien field workers could be concealed from arrest by the Immigration officers. Certain overt acts were set forth which included dates when defendants used the radio to warn of the approach of United States Immigration officers.

On May 5, 1954, the trial court signed and filed a formal written order suppressing the use in this cause of all evidence which plaintiff, United States of America, had obtained through one of its agency's (Federal Communications Commission) monitoring of radio broadcasts by defendants Robert V. H. Sugden and Jean S. Sugden; and, within the same afore-described order, the indictment in this cause was ordered dismissed.

The appellant, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the above stated order.

Dated at Phoenix, Arizona, this 11th day of May, 1954.

JACK D. H. HAYS,
United States Attorney
/s/ WILLIAM A. HOLOHAN,
Assistant U. S. Attorney
Attorneys for Appellant

[Endorsed]: Filed May 11, 1954.

[Title of District Court and Cause No. C-11555.]

NOTICE OF APPEAL

The plaintiff and appellant, United States of America, is represented by Jack D. H. Hays, United States Attorney for the District of Arizona, and William A. Holohan, Assistant United States Attorney for said District, whose address is 204 U. S. Court House, Phoenix, Arizona.

Robert V. H. Sugden, defendant in the caption, was indicted on five counts of violating Title 8 U.S.C.A. 1324(a)(3) by unlawfully concealing and attempting to conceal five named aliens who were illegally in the United States of America.

On the 5th day of May, 1954, the trial court signed and filed a formal written order suppressing the use in this cause of all evidence which plaintiff, United States of America, had obtained through one of its agency's (Federal Communications Commission) monitoring of radio broadcasts by defendant, Robert V. H. Sugden, with other persons; and, within the same afore-described order, the indictment in this cause was ordered dismissed.

The appellant, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the above stated order.

Dated at Phoenix, Arizona, this 11th day of May, 1954.

JACK D. H. HAYS, U. S. Attorney
/s/ WILLIAM A. HOLOHAN, Asst. U. S. Attorney, Attorneys for Appellant

[Endorsed]: Filed May 11, 1954.

[Title of District Court and Causes.]

CLERK'S CERTIFICATE

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case No. C-11554 Phoenix, United States of America, Plaintiff, vs. Robert V. H. Sugden and Jean S. Sugden, defendants, and case No. C-11555 Phoenix, United States of America, Plaintiff, vs. Robert V. H. Sugden, Defendant, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said cases, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of the minute entries, constitute the record on appeal in said cases as designated in the Appellant's Designations filed therein and made a part of the record attached hereto and the same are as follows, to-wit:

1. Indictment (C-11554).
2. Indictment (C-11555).

3. Motion to Suppress, (C-11554 and C-11555).

4. Reporter's Transcript, (C-11554 and C-11555).

5. Government's Exhibits 1, 2 and 3 (C-11554 and C-11555).

6. Minute entries of November 23, 1953, March 25, 1954, March 26, 1954, June 2, 1954, and June 9, 1954 (C-11554 and C-11555).

7. Notice of Appeal, filed April 23, 1954, (C-11554).

8. Notice of Appeal, filed April 23, 1954 (C-11555).

9. Order to Suppress Evidence and to Dismiss (C-11554).

10. Order to Suppress Evidence and to Dismiss (C-11555).

11. Notice of Appeal, filed May 11, 1954 (C-11554).

12. Notice of Appeal, filed May 11, 1954 (C-11555).

13. Designation of Record on Appeal (C-11554).

14. Designation of Record on Appeal (C-11555).

15. Statement of Points on Appeal (C-11554).

16. Statement of Points on Appeal (C-11555).

Witness my hand and seal for said court this 25th day of June, 1954.

[Seal] /s/ WM. H. LOVELESS,
Clerk

In the United States District Court for the District of Arizona

[Title of Causes No. C-11554, C-11555.]

TRANSCRIPT OF PROCEEDINGS

Proceedings had in the above entitled cause before the Honorable Dave W. Ling, Judge of said court, in his courtroom in the United States Courthouse, at Phoenix, Arizona, on the 25th day of March, 1954, at 3:45 o'clock p.m.

Present: Mr. William A. Holohan, Mr. Sidney Broffman, appeared for the Plaintiff. Messrs. Snell & Wilmer, by Mr. Mark Wilmer, and Mr. Bryant Jones, Yuma, Arizona, appeared for the Defendants. [1*]

(The following proceedings were had in the Court's Chambers, before the calling of the case in open court:)

Mr. Wilmer: May the record show that the defendants in the two causes which are to proceed to trial, that is, on the conspiracy charge and the charge of unlawfully concealing aliens, have presented their written verified motion to suppress the testimony of witnesses whose names were obtained through the use of interception by the Federal Communications Commission of radio communications.

It is requested the Court suppress any transcript

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

of such interceptions, and as more fully appears in the motion, I believe Mr. Holohan stated this morning there was such a transcript that was made.

Without going further, we would request at this time that the Court, prior to the trial, interrogate, or permit the interrogation of the co-conspirators named in the indictment but not charged for the purpose of ascertaining to what extent, if at all, these transcripts were used in obtaining their statements and in building the government's case.

In that respect, we have not felt at [2] liberty to talk to them, because they have been under subpoena as government witnesses, and we have been informed earlier that the transcripts were used.

On that basis, we request the court to ascertain in advance of the trial to what extent they were used, to avoid the interruption of the trial and the course of the trial.

The Court: The Court will deny the motion at this time, with leave to renew it at a later date, if it becomes necessary.

Mr. Wilmer: If it please the court, so I will understand I won't be interrupting, if in the course of the trial the government does use this transcription, is it the Court's ruling that they will be permitted to do so, and I need not make an objection at that time?

The Court: It is not necessary. At the conclusion of the government's case, if you deem it necessary, you can renew your motion.

Mr. Wilmer: What do we do then, your Honor, if the evidence is in and you find there is a par-

tial case without it, and it supplements the rest of the case?

The Court: I don't know what you would do in a case of that kind. [3]

Mr. Wilmer: Suppose in the course of his examination Mr. Holohan makes reference to this transcript?

The Court: All right. To protect your record, you will have a right to object. It would probably be the only way you could do it.

Mr. Wilmer: Then I take it that in every instance we will be required to request examinations of the witnesses on voir dire to ascertain if they are competent as witnesses before the government uses their testimony?

The Court: Off the record.

(Further discussion was had off the record.)

(The following proceedings were had in open court:)

The Clerk: C-11554, Phx., C-11555 Phx., etc., United States of America versus Robert V. H. Sudgen, et al, defendants. For trial.

Mr. Holohan: The government is ready, your Honor, in this matter.

We would like to introduce as co-counsel Mr. Sidney Broffman, a member of the bar of the Court of Appeals of the State of New York.

The Court: All right.

Mr. Wilmer: Pending the determination of the [4] motion, the defendants announce Not Ready, your Honor.

The Court: All jurors will be excused until to-

morrow morning at 11 o'clock. And you gentlemen be here at 9:30 in the morning to present your motion.

(Thereupon at 4:15 p.m. an adjournment was taken until the following morning.) [5]

March 26, 1954, 11:45 o'clock a.m.

The Court: You may proceed.

Mr. Wilmer: We would like to call for cross-examination, as an adverse party, Mr. Stratton of the Federal Communications Commission.

The Court: All right.

ROBERT J. STRATTON

called by the defendants as an adverse witness, for cross examination, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wilmer): Will you state your name, please? A. Robert J. Stratton.

Q. Will you tell us, please, what is your official position?

A. I am assistant engineer in charge of the [2] Eleventh District Office of the Federal Communications Commission.

Q. And where is your headquarters?

A. Los, Angeles, California.

Q. Does that region or district include Arizona and Nevada?

A. All of Arizona, Clark County in Nevada, and all of southern California.

Q. You have held that position for some time, have you? A. Fourteen years.

(Testimony of Robert J. Stratton.)

Q. Mr. Stratton, in connection with your work in your position there, did you have occasion to go to Yuma in September, I believe it was, of 1953?

A. I did.

Q. When did you get there?

A. The 4th of September, I believe.

Q. And by whom were you accompanied?

A. I wasn't accompanied by anyone. I was by myself.

Q. By yourself? A. Yes.

Q. Did you have any equipment of any type with you? A. Yes.

Q. What did that consist of? [3]

A. The usual direction finder and monitoring equipment.

Q. By monitoring equipment, you mean equipment used to intercept and hear radio signals?

A. Well, radio frequencies or carriers of any kind, whether there is any signal on them or not.

Q. What was the occasion for your coming to Yuma?

A. We were directed by our Washington office to make an investigation on the basis of a complaint filed by the Department of Justice in Washington.

Q. Claiming that there was occurring in the area, or there was suspicion that there was occurring in the area an offense against the laws of the United States?

A. An illegal use of radio, that is right.

(Testimony of Robert J. Stratton.)

Q. And that was the occasion for your going there? A. That is right.

Q. And your purpose was to intercept and hear all radio frequencies and the use of the radio in that area.

A. Our purpose was to confirm that the radio was being used for a purpose other than authorized.

Q. May I put it this way? Your purpose was to hear what was going on, and determine what was [4] going on? A. Yes.

Q. How long were you in the Yuma area?

A. Only one day the first time, and then I was sent back again on the 10th of September, and then again on the 18th.

Q. Were you there just on three days?

A. I believe I just spent one night. I was busy there the 9th, and 10th, and the 18th. I made three trips, I know.

Q. On each occasion were you alone?

A. No. On the second occasion two of us were dispatched from Los Angeles.

Q. Two cars, is that correct?

A. Two cars.

Q. Both equipped with this equipment——

A. Both identical automobiles.

Q. For the purpose of intercepting radio signals and frequencies?

A. No, the purpose of the two cars was not for interception. It was for location. We have to have two for triangulation.

(Testimony of Robert J. Stratton.)

Q. In other words, to determine the point from which the frequency was emanating?

A. That is correct.

Q. Did you, while you were in Yuma, meet Mr. [5] and Mrs. Sugden? A. I did.

Q. When did you meet them?

A. On the 18th, when I made a routine inspection of their station.

Q. That was the first time you had ever talked to them?

A. That was the first time I had ever talked to them. I had seen Mr. Sugden, however, once before.

Q. In the course of your investigation?

A. That is right.

Q. Where did you see the Sugdens?

A. I saw Mr. and Mrs. Sugden in their home on the 18th.

Q. And in the course of that meeting there, you went through the usual routine inspection?

A. That is correct.

Q. Did you advise them at that time that you had been monitoring their station and their use of the station? A. No, I did not.

Q. Did you at any time prior to the time you did monitor, and if I may use the layman's language, listen to the conversation, talk with them or advise them that you intended to do so? [6]

A. No, sir, certainly not.

Q. Then I take it they at no time advised you, or consented that you might do so?

A. That is correct.

(Testimony of Robert J. Stratton.)

Q. I believe on that occasion that you left with Mrs. Sudgen, in any event, a mimeographed set of your rules and regulations, and so forth?

A. Not mimeographed, no. They are regular printed rules from the Goverment Printing Office.

Q. She had advised you that they had been advised they were out of print, and you said they were not, and left her one, is that correct?

A. I gave her my own copy.

Q. Is it not a fact that she had been advised they were out of print?

A. That is, as far as I know, what she said.

Q. And that is their reason for not having one on hand?

A. I naturally assume that was their reason.

Q. Now, during the time you were doing this monitoring, Mr. Stratton, how did you record the words that you heard through the use of your equipment?

A. Well, the first day I made no recording at all, except pencilled notes in a notebook, and since the transfer occasions were coming faster [7] than I could copy them, the next time I did use a portable tape recording.

Q. That was used on the last occasion?

A. On the 10th and 18th.

Q. Or 9th and 18th?

A. 9th and 18th, yes. Excuse me.

Q. Did you spend the entire day in each instance in monitoring? A. No.

Q. Just portions of the day?

(Testimony of Robert J. Stratton.)

A. During periods of activity. We obviously would cease for lunch, and later in the afternoon when apparently the activity in the fields would stop, there was no point in further monitoring.

Q. Other than for the time when the equipment was not in use you did monitoring?

A. We monitored for other things, yes; for out of state signals coming into the state, for instance, that could have possibly been interfered with, yes.

Q. Now, when this matter was taken down, Mr. Stratton, what was done with it, the transcripts that were made and the notes that you took of the monitored information?

A. They were sent to Washington.

Q. To the offices there? [8]

A. That is right.

Q. And did you keep copies of them?

A. Oh, we always keep copies in our own files, yes.

Q. When was the first time that these conversations, if I may call it as such, were delivered to the Immigration Service?

A. There was probably a copy under confidential cover of each one within a day or two after the transcript was made.

Q. During the course of your visit here, your various visits here, Mr. Stratton, did you work with the Immigration Service in the sense of—I mean, you were in contact with the Immigration Service there at Yuma?

A. Well, in the sense that I stopped by the

(Testimony of Robert J. Stratton.)

office on my way to Yuma. We don't have any radio contact. We weren't on the same frequency.

Q. You did see them during the time you were there at various times?

A. Yes, I was ordered to on my first trip, because, obviously, the complaint was on the basis of their complaint.

Q. Did you report to various of the immigration officers there the substance of the conversations which you had taken? [9]

A. Only to the effect that their suspicions were correct.

Q. Well, now, you did then give them some of the context or general idea of what they were?

A. General idea, possibly, yes.

Q. Pardon?

A. Possibly in a general idea, yes, but not verbatim.

Q. You didn't give it specific play by play contact? A. No.

Q. Generally, what you had learned?

A. Yes.

Q. Who did you talk to there?

A. I believe it was the chief, Parker, the first one of the Immigration Service.

Q. Did you also talk to Mr. Richards?

A. Possibly. We were all together.

Q. Together on the thing?

A. Yes, sir, they were all at the office at the time, in the Yuma office.

Q. I understand that that is the Yuma office of

(Testimony of Robert J. Stratton.)

the Immigration Service? A. That is right.

Q. That was the time on the 4th, and then subsequently on the 9th and 10th, and on the 18th?

A. Very likely. I don't remember whether Chief Parker was there on the 18th or not.

Q. Then subsequently, Mr. Stratton, what if anything did you do with respect to any prosecution that was instituted? When was your next contact with the case?

A. Nothing whatever until I was supposed to appear before the Grand Jury.

Q. And when you appeared before the grand jury, you were supposed to testify with respect to what you had picked up down there in the way of conversations?

A. Well, my testimony was a running account of what had happened from the time we were first called in on the case.

Q. I take it, in other words, that you testified in considerable detail, then, before the grand jury as to the contents of the various communications which you had monitored and transcribed?

A. I wouldn't say in great detail, no. Generally.

Q. Other than for that part of your testimony, what else did you testify with reference to?

A. Well, on the methods used in locating the base station. For instance, since the address was very vague on the license, it meant nothing, in [11] fact, as far as locating the station. We used direction finders for that.

(Testimony of Robert J. Stratton.)

Q. You had no difficulty when you got to Yuma, did you?

A. I had extreme difficulty. The address on the license is "9 miles south of Yuma." That is a lot of territory.

Q. Of course, the immigration people knew where the Sugdens lived, didn't they?

A. Apparently not. If they did, they didn't give us the directions.

Q. Other than testifying how you went about doing your monitoring, that is, describing your various steps in setting up your equipment, and that sort of thing, the balance of your testimony related to the substance of the conversations which you had intercepted through your monitoring equipment?

A. That is correct, the general use of the radio in that particular case.

Q. Since that time, Mr. Stratton, have you had any further connection with the present case that is pending now here?

A. Other than numerous trips for——

Q. What has been the purpose of those trips?

A. I was called for a trial in February.

Q. Other than that, have you had occasion to [12] work with the U.S. Attorney in preparation of this case?

A. No. Little, if anything, other than to confirm the reports that we had sent to the Immigration Service. I am not an attorney.

Q. I understand that, but from the standpoint

(Testimony of Robert J. Stratton.)

of furnishing factual information as to the substance of the transcripts taken, if I may use that phrase, were those gone over with the United States Attorney?

A. Well, we didn't send any to the U.S. attorney.

Q. Did he have them when you talked with him?

A. I saw no copies of our reports. He had copies of immigration reports there.

Q. The U.S. attorney did have a knowledge of the substance of the communications which you had monitored, is that right?

A. I am under the impression he had the general information, although I did not read his reports, nor did I read the reports furnished him by the Immigration Service.

Q. How many times did you confer with the United States Attorney on that?

A. Just before the Grand Jury hearing. It was once. [13]

Q. Well, subsequent to the Grand Jury?

A. Well, the one day before the trial that was set for February, and one day before this one, Tuesday.

Q. Going over with him the substance of the conversations you heard, to which you proposed to testify?

A. Actually, this last trip, no. That was more concerned with other witnesses. Very little was said about me.

(Testimony of Robert J. Stratton.)

Q. Mr. Stratton, your trip here in February, then—— A. Yes?

Q. And your conference with the U.S. Attorney was for the purpose of going over with him the testimony you would give as to the communications which you had heard? A. That is correct.

Q. And you went over that with him?

A. In February, that is right.

The Court: We will suspend at this point until two o'clock.

(Thereupon, at 12:00 o'clock noon a recess was taken until two o'clock p.m. of the same day.) [14]

The Court: You may proceed.

ROBERT J. STRATTON

resumed the stand and testified further as follows:

Mr. Wilmer: We have no further questions.

Cross Examination

Q. (By Mr. Holohan): Now, Mr. Stratton, in the course of your monitoring of the Sugden's radio, were you at any time close to the border of Mexico? A. Yes, I was.

Q. And in relation to that, where were you?

A. I would say within 75 feet on the American [15] side of the fence.

Q. And you were receiving radio signals from the Sugdens at that time? A. Yes, sir.

Q. You have examined the radio station of the Sugdens? A. Yes, sir.

(Testimony of Robert J. Stratton.)

Q. And on the basis of that examination, could you give an opinion, from your knowledge, as to approximately how far that station could send signals?

A. Well, with the antenna they were using, or the frequency, I would say certainly a good coverage up to a 70-mile radius, under certain conditions farther.

Q. And this monitoring took place in and around the territory of Yuma, Somerton, and near the Mexican city of San Luis?

A. That is right.

Q. That is approximately how far from the border of California and Arizona?

A. Well, Yuma is right on the border of California, and San Luis is approximately 20 miles to the south of Yuma, or southeast, possibly, a little.

Q. Based on what you have learned, would you say that signals from the Sugden radio would carry across into Mexico, and across into California?

A. Oh, definitely.

Q. Now, I note that you have a file there. May I have that for a moment?

A. Yes. (Handing to counsel.)

Q. In your duties with the Federal Communications Commission, do you have anything to do with licensing operators?

A. Operators, yes.

Mr. Wilmer: With operators?

The Witness: Operators only.

(Testimony of Robert J. Stratton.)

Q. (By Mr. Holohan): What do you have to do with that?

A. We accept the applications. On some types of licenses we require an examination. Others are called permits, which do not require an examination, and there is required merely the submission of an application, upon receipt of which, if they are properly completed, a permit is issued.

Q. Now, do you recall anything in regard to the defendants in this case, Robert and Jean Sugden, with respect to licenses?

A. Yes, they each filed an application, which was incomplete, and had to be returned to them. It was returned to them.

Mr. Holohan: I will ask that this be marked [17] Government's Exhibit 1 for identification.

The Clerk: Government's Exhibit 1 for identification.

(Said document was marked Government's Exhibit 1 for identification.)

The Witness: May I ask here that the originals be returned, because they are part of our file.

Mr. Wilmer: On counsel's statement, we will agree that a photostat may be substituted and marked in lieu of the originals.

Mr. Holohan: All right.

The Court: All right.

Mr. Holohan: You have seen these photostats, Mr. Wilmer?

Mr. Wilmer: If you say they are all right, it is satisfactory.

(Testimony of Robert J. Stratton.)

The Clerk: Government's Exhibit 2 for identification.

(Said document was marked Government's Exhibit 2 for identification.)

Q. (By Mr. Holohan): I will hand you Government's Exhibit 1 here, with regard to the licensing of what purports to be Robert Sugden.

Are you familiar with that?

A. Yes, I am. [18]

Q. How are you familiar with it?

A. I am familiar with it in that it was received at our office at one time, approximately the 9th of September, and had to be returned because of incomplete answers in the application. And that on the 17th of September, the permit was issued from our office.

Q. Now, is this permit a copy of the application taken from the files there in Los Angeles?

A. This is taken from our files in Los Angeles, yes, sir.

Q. Do you have anything to do with the files?

A. Yes, as assistant engineer in charge, I have joint custody with the engineer in charge.

Q. I will hand you Government's Exhibit 2 and ask you the same questions with regard to that?

A. Yes, the answers would be exactly the same in both cases.

Q. I will now ask you with regard to Government's Exhibits 1 and 2 for identification, whether they have what purports to be signatures on them?

A. Yes, they do.

(Testimony of Robert J. Stratton.)

Q. And what are the signatures on Government's Exhibit 1?

A. Robert V. H. Sugden.

Q. And what is the signature on Government's [19] Exhibit 2? A. Jean S. Sugden.

Mr. Wilmer: We have no objection other than the regular objection to materiality, your Honor.

The Court: All right, they may be received.

The Clerk: Government's Exhibits 1 and 2 in evidence.

(Said documents were received in evidence and marked Government's Exhibits 1 and 2.)

Q. (By Mr. Holohan): Government's Exhibits 1 and 2 show the date when the license was actually issued by the Federal Communications Commission? A. Yes, sir.

Q. Do you recall when that was?

A. September 17, 1953.

Mr. Holohan: That is all we have for you at this time, Mr. Stratton.

Mr. Wilmer: Just a couple of questions, if I may.

Redirect Examination

Q. (By Mr. Wilmer): In connection with these Exhibits 1 and 2, do you recall, or can you tell from looking at them which were the omitted blanks? A. Those that are checked. [20]

Q. Those are checked?

A. Those that are checked, that is right. They were checked in red, originally, on the originals. It shows white on these.

(Testimony of Robert J. Stratton.)

Q. And they were then returned with an instruction to complete them?

A. To complete the form, yes. There is a little mimeographed slip that is attached to them.

Q. I take it that these are the type of permits which issue as a matter of course if the application that is filed is completed, and there is nothing on it that indicates some objection, is that right?

A. That is correct. If the person is a citizen, and indicates on the rear that they are completely familiar with the rules and regulations, then they are issued as a matter of course. And of course, no prison, conviction of felony——

Q. No felony history?

A. That is right.

Q. So that the type of permit which is issued here does not require an examination, or anything of that nature? A. No, it does not.

Mr. Wilmer: That is all.

Mr. Holohan: One question. [21]

Recross Examination

Q. (By Mr. Holohan): This type of license is required before an operator can legally operate a radio?

A. That is correct. This type of license is required for this particular type of radio. There are other types which require a higher class license.

Mr. Holohan: That is all I have.

Mr. Wilmer: That is all.

(Witness excused.)

HORACE BILLINGSLEY

called as a witness by the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Jones): Will you state your name, please? A. Horace Billingsley.

Q. Mr. Billingsley, you live in Yuma County, Arizona, do you not? A. Yes, sir.

Q. Were you employed by the defendant, Robert V. H. Sugden, last year? A. Yes, sir.

Q. And during the month of September, 1953, were you employed by Mr. Sugden?

A. Up through the 9th of September, yes. [22]

Q. And you terminated your employment with him at that time, is that correct?

A. Yes sir.

Q. Now, at any time during the month of September, 1953, were you brought to Phoenix, Arizona? A. Yes, sir.

Q. Do you recall the date when you were brought to Phoenix? A. No, sir, I don't.

Q. Was it the latter part of September, or the middle part?

A. It was somewhere around the middle or the latter part.

Q. Of September? A. Of September.

Q. And who brought you to Phoenix?

A. The Immigration Service, Mr. Richards.

Q. Did anyone else accompany you?

A. Yes, sir. Mr. Cameron and a Mexican.

(Testimony of Horace Billingsley.)

Q. In fact, your brother was also along, was he not? A. He was in another car.

Q. All right, now, what happened when you arrived in Phoenix at that particular time?

A. We were taken before the United States attorney. [23]

Q. And do you recall his name?

A. Yes, sir, Mr. Scruggs.

Q. Did you have any conversation with Mr. Scruggs at that particular time?

A. Yes, sir.

Q. And was that conversation concerning these particular charges that have been filed here?

A. Yes, sir.

Q. During the course of that conversation, were you shown any transcriptions purportedly from the two-way radio operated by Mr. Sugden in his operation? A. No, sir.

Q. Were you told by anyone during the course of this conversation that the conversations during the month of September emanating from the radio station and the pickup trucks had been monitored or transcribed? A. Yes, sir.

Q. And who told you that?

A. Mr. Scruggs.

Q. Did anyone else during that conversation mention the transcription of these radio communications? A. No, sir.

Q. Do you recall what Mr. Scruggs said about [24] the transcripts?

A. He said that he had it on record.

(Testimony of Horace Billingsley.)

Q. Did he elaborate on that? A. No, sir.

Q. And by that what did you believe he meant?

A. That he had a wire recording of the——

Q. Conversations? A. Conversations.

Q. Which had taken place during the course of your employment? A. Yes, sir.

Q. By Mr. Sugden over this radio communication apparatus, is that correct? A. Yes, sir.

Q. Now, did Mr. Scruggs question you in respect to the use of the radio by Mr. Sugden, and you, and the others? A. Yes, sir.

Q. And what did he ask you in connection with the radio?

A. If we used them to hide the Mexicans.

Mr. Jones: That is all.

Cross Examination

Q. (By Mr. Holohan): Who was present at this interview that you speak of? [25]

A. Mr. Richards.

Q. That is the man from El Centro?

A. Yes, sir.

Q. And Mr. Scruggs, the then U. S. attorney?

A. Yes.

Mr. Holohan: That is all we have.

Mr. Wilmer: That is all.

(Witness excused.)

LAWRENCE THOMAS GERHART

called as a witness by the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Jones): Will you state your name, please? A. Lawrence Thomas Gerhart.

Q. You also live in Yuma County, do you not, Mr. Gerhart? A. Yuma County.

Q. And last year you were employed by Robert V. H. Sugden, were you not? A. Yes, sir.

Q. When did that employment terminate, Mr. Gerhart? A. On the 16th of September.

Q. Now, just prior to, or after the termination [26] of your employment, did you have any conversation with any of the immigration officers concerning the use of the two-way radio?

A. Yes.

Q. And where and when, if you recall, did that conversation take place?

A. I don't know exactly the dates, but it was in Yuma. They took me in to Yuma, Mr. Richie, and some other guy I don't recall his name.

Q. And where did they take you from, Mr. Gerhart? A. My house.

Q. And they took you in to Yuma, is that correct? A. Yes.

Q. Was that after you had quit working for Bob? A. Yes, that is right.

Q. And where did they take you in Yuma?

A. Oh, the immigration building there, I believe they call it.

(Testimony of Lawrence Thomas Gerhart.)

Q. And that was Mr. Richie and some other person, is that correct? A. Yes.

Q. Now, did you have a conversation with them at that time in regard to the use of the two-way [27] radio? A. Yes.

Q. And what if anything was asked you concerning the use of that radio?

A. Well, I don't know. It was quite a bit. So much I can't remember, but we talked a good half a day there on it, I believe.

Q. And did either of these men, or anyone else, say anything to you about having monitored and made transcriptions of conversations on that two-way radio? A. Yes.

Q. And do you recall what was said in that regard?

A. Well, I don't know. It seemed like they said something about not getting off on the wrong foot, or something, that they had recordings of the conversations that was carried on over the radios, and they let me read something there. It seemed like they had some kind of a recording. I don't know. I didn't read but just a little of it.

Q. They handed you a paper which had something on it, and you read from it, is that correct?

A. Yes.

Q. Did that appear to be a transcript of any of the conversations? [28]

A. Well, it seemed to be, yes, it did.

Q. Was it a conversation in which you were involved? A. No.

(Testimony of Lawrence Thomas Gerhart.)

Q. I see. Do you recall any names on this paper?

A. Well, there was one name, but it didn't ring true to me, and so I quit reading it right there, when I seen the name that wasn't familiar.

Q. Did there seem to be many—Did they seem to have very many of these transcripts?

A. Well, as best I can remember, it seemed like there was four or five pages.

Q. But they handed you just one?

A. No, they was all together.

Q. And did you go through all of them?

A. No, no.

Q. In order that we may be clear, would you say that one of them said, Let's don't get off on the wrong foot, we have everything down here?

A. Well, it seems that the way it appeared they might have thought that I might start lying, or something or other, and it seems that they wanted me to know right away that they had records of the conversation that went over the radios.

Q. And they were referring to the two-way [29] radio that Bob Sugden was operating?

A. That is right.

Q. Mr. Gerhart, did you appear before the Grand Jury in Tucson? A. Yes, sir.

Q. Were you questioned before the Grand Jury in regard to the use of this two-way radio?

A. I don't think so. I don't recall whether they mentioned it or not.

Q. Now, other than the conversation that you have just testified to, in which Mr. Richie and one

(Testimony of Lawrence Thomas Gerhart.)

other person was present, did you have any other conversations with any immigration officials, or other officers of the U.S. government in regard to the use of this two-way radio?

A. No, I don't recall.

Mr. Jones: I think that is all.

Cross Examination

Q. (By Mr. Holohan): This questioning that they had by Mr. Richie that started out down in Yuma, did that statement of his that he had the recordings, was that to induce you to testify or disclose information to them, or were you a willing witness to begin with?

A. Oh, I was a willing witness to begin with.

Q. And you could find no information, to your [30] knowledge, of any transcription containing your name, or there was not any mention of that, was there, at that particular conversation?

A. Well, since I didn't read it, why, I just pushed it back across the desk, and he was asking me questions about our operations down there, and wanted to know how I identified the camp. And I believe I told him I had always called the camp "D", and it appeared to me like he was going along with what I was saying, that he had it recorded on this paper, and he said,—I believe he beat me to that, that you identified your camp as "D", or something, and I said yes. And I just figured——

Mr. Holohan: That is all I have.

The Witness: Thank you.

(Testimony of Lawrence Thomas Gerhart.)

Mr. Jones: That is all.

(Witness excused.)

Mr. Jones: Mr. Beal Billingsley.

BEAL BILLINGSLEY

called as a witness by the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Jones): Will you state your name, please? A. Beal Billingsley.

Q. And you also live in Yuma County, do you [31] not, Mr. Billingsley? A. Yes, sir.

Q. And you are a brother of Horace Billingsley who has just been on the stand?

A. Yes, sir.

Q. Last year you were employed by Robert Sugden, were you not? A. Yes, sir.

Q. And when did that employment terminate?

A. About the first of June.

Q. First of June of last year?

A. Yes, sir. I think that is about right, yes, sir. That was when I went to work for him on his place, at that time.

Q. That is when you commenced working for him? A. Yes.

Q. And when did you finish working for him?

A. I am still working for him.

Q. I see. All right. Now, do you recall coming to Phoenix during the month of September, 1953?

A. Yes, sir.

(Testimony of Beal Billingsley.)

Q. Do you remember the approximate date you came to Phoenix?

A. No, sir. Somewhere along the latter part of September. [32]

Q. And with whom did you come to Phoenix?

A. Mr. Richie, the immigration officer.

Q. Was anyone else in the car?

A. Yes, sir, there was another fellow with us.

Q. And what happened after you got to Phoenix?

A. We was brought up before the U.S. attorney, Mr. Scruggs.

Q. And were you and Horace in there at the same time? A. No, sir.

Q. Who was in Mr. Scruggs' office when you were there?

A. Mr. Richards and another fellow, I don't remember his name.

Q. And was there any conversation carried on then concerning the use of the radio equipment owned by Mr. Sugden? A. Yes.

Q. And what was that conversation, as best you recall it, Mr. Billingsley?

A. Well, he just asked us about the radios and what use they used them for.

Q. Now, did Mr. Scruggs, or anyone else present tell you that they had transcripts of the radio conversations? A. No, sir. [33]

Q. No one told you that?

A. No, sir.

Q. At any time on your way to Phoenix, ac-

(Testimony of Beal Billingsley.)

companied by the immigration officers, did they tell you that they had transcripts of the radio conversations? A. No, sir.

Mr. Jones: That is all.

Mr. Holohan: No questions.

(Witness excused.)

Mr. Jones: Mr. Sommers.

ROBERT F. SOMMERS

called as a witness by the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Jones): Will you state your name, please? A. Robert F. Sommers.

Q. Where do you live, Mr. Sommers?

A. In Tucson.

Q. And were you employed by Robert Sugden last year? A. Yes, sir.

Q. And when were you employed by him?

A. From about the 1st of August to about the 18th of September. [34]

Q. Now, after the termination of your employment with him, were you called to testify before the Grand Jury in Tucson? A. Yes.

Q. Do you remember about when that was?

A. No.

Q. Sometime after you finished working for him, is that correct?

A. Yes, sir, it was a couple of weeks. It was about the first week in October, I think.

(Testimony of Robert F. Sommers.)

Q. Now, did anyone at the time of your testimony before the Grand Jury, or before, talk to you about the use of a two-way radio?

A. Yes.

Q. And who talked to you about that?

A. I believe it was Mr. Richards questioned me just before the Grand Jury hearing.

Q. And in the course of that conversation, did Mr. Richards indicate to you that he had transcripts of the radio conversations? A. Yes.

Q. And what did he say in connection with that?

A. Well, he asked me a couple of questions, and I kind of hesitated there, and he said, Well, you know, we have transcriptions of all the radio [35] conversations.

Q. And that is what Mr. Richards told you?

A. Yes.

Q. Did you have any further conversation with him? A. No.

Q. Then you testified before the Grand Jury, is that correct? A. Yes.

Q. And did you testify concerning the radio conversations before the Grand Jury?

A. I don't remember.

Q. At the time of your testimony before the Grand Jury, were you shown any transcripts of the radio conversations? A. No.

Q. Have you had any conversation with any other immigration officers or other United States officers since that time concerning the use of the radio? A. Yes.

(Testimony of Robert F. Sommers.)

Q. And when was that?

A. About a month ago, in Tucson.

Q. And whom did you talk to at that time?

A. Mr. Kimres. He is an immigration officer in Tucson. [36]

Q. And did you discuss at that time the use of the radio? A. Yes.

Q. Was anything said about the transcripts at that time? A. No.

Mr. Jones: I think that is all.

Cross Examination

Q. (By Mr. Holohan): Who was present, if anyone, when you had this conversation with Mr. Richards?

A. Well, no one was there all the time, but Mr. Richie come in now and then. He was talking to George and some other fellow. I think he worked for the radio. He wasn't the one that was here a minute ago, a younger one. He was there toward the last when he was asking me questions.

Q. And do you recall, when this conversation concerning transcriptions came up, do you remember who was present then?

A. No, I believe just he and I were there.

Q. Was that at about the beginning of the interview?

A. Yes, just after he started asking me questions.

Q. To the best of your recollection, then, [36a] just you and Mr. Richards? A. Yes.

(Testimony of Robert F. Sommers.)

Q. Were present? A. Yes.

Mr. Holohan: No further questions.

Mr. Jones: One more question.

Redirect Examination

Q. (By Mr. Jones): During this conversation with Mr. Richards, were you shown any transcripts? A. No.

Q. Did you see any transcripts in his possession? A. No.

Q. Now, did the other man whom you thought to be connected with the Communications Commission, or described as a radio man, when he was present, did he have anything to say about the transcriptions? A. No.

Mr. Jones: I think that is all.

Mr. Holohan: That is all I have.

(Witness excused.)

Mr. Wilmer: If it please the court, I believe that counsel indicated this morning that the government has made substantial use of these transcripts in the preparation of the cause, and that the government [37] proposed to substantially rely upon the testimony of Mr. Stratton in the presentation of its case.

Mr. Holohan: That is a correct statement, counsel.

Mr. Wilmer: I will call Mr. Robert Sugden.

ROBERT V. H. SUGDEN

called as a witness for the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wilmer): State your name, please?

A. Robert V. H. Sugden.

Q. Bob, you are one of the defendants in these causes? A. Yes.

Q. In June of 1953, did you have occasion to contact anyone with respect to procuring a radio communication system for your use in Yuma?

A. Yes. I contacted Bud Bridges previous to June, and in June he came to my house to see me.

Q. Who is Bud Bridges?

A. Bud Bridges is the Motorola salesman and technician for this area.

Q. Did you at that time have any experience [38] or knowledge with respect to the Federal Communications law or regulations?

A. No.

Q. I presume that you are acquainted, as we all are, with the fact that Motorola is one of the outstanding electronics manufacturers and specialists in the country?

A. I investigated two or three other makes of——

Q. I say, were you aware at that time of their outstanding position in the field?

A. Yes. They are.

Q. Did he solicit your purchase of the equipment, and did you buy it?

(Testimony of Robert V. H. Sugden.)

A. Yes, I did give him an order for it at that time.

Q. What if anything was done with respect to procuring a license?

A. I asked him if we would have to take some examinations for licenses, and he said no, that he would take care of the licenses.

Q. Now, did you at that time make an application for a station license, or was an application made for a license for the station, Bob?

A. He said he would fill one out, and he had me sign the form, and he filled it out. [39]

Q. Did you sign the form in blank, or did you fill it out first?

A. It was the following week, we saw him here in Phoenix, and he typed it out at his residence, and we signed it, or I signed it.

Q. That was for the station license itself?

A. Yes, sir.

Q. Now, when was it you had this conversation with him respect to whether or not an operator's license was required?

A. That was the first time I talked to him, at Yuma.

Q. And he told you he would take care of it?

A. Yes, sir.

Q. That there was no examination required?

A. Yes, sir.

Q. Now, in the obtaining of this equipment and of the necessary operating authority, did you look

(Testimony of Robert V. H. Sugden.)

to anyone else other than Mr. Bridges for advice or help?

A. No, sir. He guided us on the thing.

Q. Then, Bob, after the station was equipped, or, rather, was set up and equipped, was Mr. Bridges there all through that time?

A. During the time it was being set up?

Q. Yes. Or did he come there from time to [40] time?

A. He came there periodically. He had other calls around the state, and he would stop in weekly and see us, and he came down shortly after the station, or after the equipment had gotten there and had been installed.

Q. Now, I believe your station license arrived at approximately August 26 of 1953, is that right?

A. Yes, sir.

Q. And after that time, after the license arrived, did Mr. Bridges come to Yuma?

A. He came down within a few days.

Q. Was there any conversation had at that time with respect to the necessity of your having an operator's license to operate?

A. He left us forms to fill in and send in to get the permit.

Q. Was there any conversation had, Bob? Did he make any statement to you that he forgot, or that it was necessary for you to have the operator's permit?

A. He said to send them in, fill them out and send them in.

(Testimony of Robert V. H. Sugden.)

Q. Now, at that time the license had arrived and the station was in operation? [41]

A. Yes, sir.

Q. Why did you continue, or why did you operate it, Bob, after the—I mean, prior to the time your permit arrived?

A. Well, we knew Bud was taking care of everything that was necessary, or presumed him to be, and at the time the station license came, there was another little paper came with it that had five or six statements on it, and one of them was that operators' licenses were held, or being obtained. I knew Bud would be by and straighten out the license deal, so we figured that it was all right.

Q. Well, he knew the station was in operation, did he? A. Yes, he did.

Q. He knew that you were operating it regularly at that time? A. Yes.

Q. Did he at any time advise you that you should not operate it until your permit got there?

A. No, I don't believe so.

Mr. Wilmer: That is all. Well, one other question. I think the F.C.C. gentleman cleared it up.

Q. (By Mr. Wilmer): You did send in the application, and it [42] came back, and you filled out some more information and sent it in, on your permit? A. Yes.

Mr. Wilmer: That is all.

(Testimony of Robert V. H. Sugden.)

Cross Examination

Mr. Holohan: I would like to have this marked Government's Exhibit 3 for identification.

(Said document was marked Government's Exhibit 3 for identification.)

Q. (By Mr. Holohan): I show you Government's Exhibit 1 in evidence, and ask you to look that over, and more particularly the signature on the reverse side? A. Yes?

Q. And with regard to the signature on Government's Exhibit 1 in evidence, can you tell whose signature that is?

A. That is my signature, sir.

Q. Is that the application for radio operator's license that you made to the F.C.C.?

A. It appears to be. I think it is.

Q. I will hand you Government's Exhibit 2 in evidence, and ask you, first of all, are you familiar with your wife's signature?

A. Yes, I am familiar with her signature.

Q. I will ask you to look on the reverse side [43] of Government's Exhibit 2 in evidence. Is that her signature? A. Yes, sir.

Q. Is that her application for a radio operator's license? A. I believe so.

Q. I will hand you Government's Exhibit 3 for identification and ask you to look that over and see if you recognize the photostatic copy parts there? A. Yes, sir.

Q. And do you recognize that?

A. I recognize the top half. I don't remember

(Testimony of Robert V. H. Sugden.)

the bottom half here offhand, but I see I signed it.

Q. That is your signature? A. Yes, sir.

Q. And what is that Government's Exhibit 3 for identification? What does that concern?

A. Well, this is the station license and construction permit.

Q. Now, I call your attention to the matter on the last photostatic page here of Government's Exhibit 3, under Remarks and Additional Data, that typewritten part there: "Applicant is engaged in the activities of general farming, land clearing, [44] insect control and cultivation. Two-way radio is proposed for use on farm vehicles, such as pickup trucks, tractors, and plows."

Are you familiar with that typewritten part?

A. Yes, sir. Mr. Bridges wrote that in.

Q. At anybody's direction?

A. No. Because he said he knew how to write it so that it would be in proper form.

Q. Is that what you were intending to use your station for?

A. Generally. But we don't put radios on plows. We laughed at that, but he sent it that way, anyway. We don't put radios on plows.

Q. That was generally what you wanted to use it for, was farming purposes?

A. Yes, sir.

Mr. Holohan: All right. We offer in evidence Government's Exhibit 3 for identification as Government's Exhibit 3, a photostatic copy from the records of the Federal Communications Commis-

(Testimony of Robert V. H. Sugden.)

sion of the application of the defendant for a station license.

Mr. Wilmer: Other than as to its materiality, we have no objection.

The Court: It may be admitted. [45]

The Clerk: Government's Exhibit 3 in evidence.

(Said document was received in evidence and marked Government's Exhibit 3.)

Q. (By Mr. Holohan): Do you recall, without looking at that paper, Government's Exhibit 3 in evidence, what date the station was licensed?

A. Yes, sir. It was licensed on the 27th.

Q. I see. Now, when were you licensed as an operator?

A. My permit came back for the 17th.

Q. For the 17th? A. Right.

Q. And you and your wife submitted those on what date?

A. Shortly after we received the application forms from Mr. Bridges.

Q. Do you drive an automobile?

A. Yes, sir.

Q. Do you have a driver's license?

A. I have a state chauffeur's license, sir.

Q. Had you ever discussed this question of having a license with Mr. Stratton back there at the Federal Communications Commission?

A. No, sir. The first I was able to talk to Mr. Stratton was when he came to make a station [46] investigation.

Q. That was on the 18th, wasn't it?

(Testimony of Robert V. H. Sugden.)

A. That was on the 18th.

Q. Was there any discussion then about licensing?

A. Not so much discussion. He said, "I see you have only had your license a few days," and that was the only comment I heard about it.

Q. Did you make any comment with regard to something to the effect, "Well, we have been so busy I just haven't had time to get a license?"

A. We were busier than bird dogs, that is for sure. I don't remember any such thing.

Q. You just don't remember? A. No, sir.

Q. But while the radio station was there in the house—that was the main spot, wasn't it, in the house, and then in the mobile units? Wasn't that the way it was to go? A. Yes, sir.

Q. But while it was there, it was operated by you, or at least the mobile units, without a license?

A. The mobile units do not require the operator's license, I understand.

Q. To your knowledge, was the home base [47] operated without a license?

Mr. Wilmer: If it please the court, this witness was intended for the sole purpose of the question of the circumstances under which the operation was conducted, and counsel is now going beyond that.

The Court: I am sorry. Will you read the question.

(The last recorded question was read by the reporter.)

Mr. Wilmer: We believe, if it please the court,

(Testimony of Robert V. H. Sugden.)

the witness is intended as a witness on the question of the circumstances——

The Court: He might use it against him in some other case.

Mr. Wilmer: That is exactly what I have in mind, your Honor.

The Court: All right. He will not be required to answer.

Mr. Holohan: That is all I have. Thank you.

Mr. Wilmer: That is all.

(Witness excused.)

Mr. Wilmer: I call Jean S. Sugden. [48]

JEAN S. SUGDEN

called as a witness for the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wilmer): Your name is Jean S. Sugden? A. Yes, sir.

Q. And you are the wife of Bob Sugden, who just left the stand, and also one of the defendants? A. Yes.

Q. Jean, in June, or thereabouts, of 1953, do you recall when you and Bob decided to buy this radio, and the circumstances surrounding it?

A. Oh, yes.

Q. When you contacted Mr. Bridges, will you please tell us whether or not you relied completely upon him for information as to what you should do to put the station in operation legally?

(Testimony of Jean S. Sugden.)

A. Yes, sir. As far as I am concerned, I didn't go to him, but in every respect that I was concerned, I did, yes.

Q. Did he prepare the application for the station license? A. Yes.

Q. Did you ever discuss with him whether or not it was necessary that you have a permit to operate [49] it yourself?

A. I didn't. I heard my husband ask him.

Q. And when was that?

A. In June when he was in our home.

Q. Do you recall what the answer was?

A. Yes. He said—Well, I can't say his exact words, but at any rate he said, "Well, don't worry about it. We will take care of it when the time comes."

Q. Then after the station was installed and your license arrived, Jean, did you have a further talk or discussion with Mr. Bridges at that time?

A. Well, yes, several times.

Q. I mean with respect to an operator's license?

A. Oh, no, never, not until after the station license had come.

Q. And that was some time the last part of August? A. Yes, sir.

Q. Do you recall the circumstances surrounding that conversation?

A. Yes. It was in our home.

Q. And I believe this base station was in your home also, is that right? A. Yes. [50]

(Testimony of Jean S. Sugden.)

Q. And you took care of it along with your household duties, is that right? A. Yes.

Q. Would you tell us at best you can just what was said at that time?

A. Well, he said, "You should have some operators' licenses." And he said, "How many will you need"?

And we didn't understand him. And then he explained who would need them and who would not need them. So we told him how many forms we would need. And he said, "Get them right in." And that is all.

Q. That conversation was in your home where the central station was, is that right?

A. Yes.

Q. Was the station in operation at that time?

A. Yes.

Q. Were you using it while he was there?

A. I think so. I don't know exactly but I think it was in operation all the time.

Q. As for Mr. Bridges, you knew who he was and the company he represented, did you not?

A. Of course.

Q. Did you rely completely upon his advice as to what was required or needed to put your station in operation, in legal operation? [51]

A. We had no one else to rely upon, of course, at that time.

Q. Did he warn you or tell you at any time that the station should not be in operation, or you should not talk over it until your permit came?

(Testimony of Jean S. Sugden.)

A. He never told us not to.

Q. If he had, what would you have done?

A. Well, I don't do things against the law.

Q. You would have shut it down?

A. Of course.

Mr. Wilmer: That is all.

Cross Examination

Q. (By Mr. Holohan): Do you have a driver's license? A. Yes.

Q. I will hand you Government's Exhibit 2 in evidence, and ask you to look that over. I direct your attention more specifically to the signature on the reverse side. Is that yours? A. Yes.

Q. Now, I direct your attention also to one item, if I may, Mrs. Sugden, on the reverse side of Government's Exhibit 2, in Item 13, where appears the word Yes. Whose writing is that? A. Mine.

Q. Now, you have stated the Motorola representative [52] advised you people that he would take steps to help you, or perhaps even get the licenses for you?

A. He had gotten our first one. We just assumed he would help us all the way through, of course.

Q. And he asked you how many forms you would need for the application? A. Yes.

Q. When did you actually get licensed?

A. What license?

Q. With regard to an operator's license?

(Testimony of Jean S. Sugden.)

A. They came the 17th, I think. I believe so. At least it says 17 on it.

Q. Now, you say the radio was in operation while this man was on the scene. Do you know whether anybody was using it while he was there?

A. On that particular day?

Q. Yes.

A. I don't remember exactly that day, no.

Q. Now, what was your impression was the reason for applying for one of these licenses? It was actually to be a licensed operator, wasn't it?

A. He gave us the forms and said we had to have one, yes.

Q. He said you had to have a license to [53] operate?

A. No. He said we should have an operator's permit. I thing that is what it is called.

Q. What the actual technical term is, he said you should have an operator's permit, didn't he?

A. He gave us the forms and told us to fill them out, yes.

Q. And to your way of looking at that——

A. That is what he said.

Q. Then it was your impression that you needed a permit to operate the radio, then?

A. I didn't know whether we had to have one to operate or not. All I knew was you had to send the forms in.

Q. You are a graduate of Yuma High down there, aren't you?

A. No, sir, I am not. Des Moines, Iowa.

(Testimony of Jean S. Sugden.)

Q. That was the high school up there?

A. No. It is Roosevelt.

Q. It is called Roosevelt?

A. Roosevelt High School.

Q. In other words, you had a high school education? A. Yes, sir.

Mr. Holohan: No further questions.

Mr. Wilmer: That is all. [54]

(Witness excused.)

Mr. Wilmer: That is all we have to offer, your Honor.

The Court: We will have a brief recess.

(Recess.)

The Court: You may proceed.

Mr. Holohan: The government would like to introduce one witness, your Honor.

THEODORE KIELING

called as a witness by the Government, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Holohan): State your name for the record? A. Ted Kieling.

Q. Where do you reside, Mr. Kieling?

A. In Yuma, Arizona.

Q. Do you know the defendants in this case, Robert and Jean Sugden? A. I do.

Q. About how long have you known them?

A. Oh, since the last part of July, I guess.

Q. Of what year? A. 1953.

(Testimony of Theodore Kieling.)

Q. Now, what is your job? [55]

A. Technician for the Sheriff's office.

Q. Pardon?

A. Radio technician for the Sheriff's office.

Q. Now, did you ever go over to the Sugdens home in regard to radio work?

A. Yes, several times.

Q. Was that in your capacity as a peace officer or what? A. No, as a techician.

Q. Now, in the course of your examination of the radio, were you ever asked any questions concerning the procedures for licensing, and so forth?

A. No.

Q. Now, directing your attention to the month of September, 1953, around the 8th, were you at the Sugden's place? A. Yes, on the 8th.

Q. Pardon? A. On the 8th.

Q. And why were you there?

A. I was getting ready to go on my vacation, and I wanted to make their final frequency check and modulation checks for their base station, which was required by the Commission, and I went out and made their checks.

And the F.C.C. has a form which you have [56] to fill out on completion of an installation. Being as they didn't have their operator's permit, I didn't have them finish the form until when they received their operator's permit back, and told them to go ahead and send the form in.

Q. Now, was there any discussion of any re-

(Testimony of Theodore Kieling.)

quirement about an operator's permit and the operation of the radio?

A. Yes. I furnished them with the forms, and showed them how to fill them out, and told them when they got them back to sign their completion report and send it in.

Q. Was there any discussion about prohibition of operating the radio prior to getting the license?

A. Yes.

Q. And can you tell us about that?

A. That was way back in July I believe, or the first of August.

Q. And can you tell us the place, the time, and the circumstances?

A. It was on the telephone, and they wanted me to come out and hook up the base station. And I told them I couldn't hook it up because they didn't have their station license yet. And he wanted to use it, and I told him if he would hook it up to 110 and put the aerial on it, and if the milliammeter [57] didn't read over 200 milli-amps, it wouldn't hurt. If it was too much it would damage the tubes, but it wouldn't hurt it seriously.

Q. Was there ever any discussion about any prohibition about operating the station without an operator's license?

A. Yes, when I was there the 8th.

Q. And what was that?

A. That was when I gave them the forms and told them I couldn't fill out their completion report because they didn't have their operator's license. I

(Testimony of Theodore Kieling.)

told that to Mrs. Sugden. She was the only one there at the time. That was at the house.

Q. She was at the house?

A. She was at the house.

Mr. Holohan: That is all.

Cross Examination

Q. (By Mr. Wilmer): You told her you could not complete it because they didn't have their operator's license?

A. No, I couldn't complete it because they didn't have——

Q. I asked you what you said. You said you couldn't complete it because——

A. Because she hadn't received her operator's permit. [58]

Mr. Wilmer: That is all.

Mr. Holohan: That is all.

(Witness excused.)

Mr. Holohan: That is all we have, your Honor.

Mr. Wilmer: I wonder if we shouldn't do the balance of this in chambers, and see what the record should or should not be.

The Court: What difference does it make?

Mr. Wilmer: It is the defendants' position at this time, your Honor, that it affirmatively appears there is a serious conflict in the evidence, that from the inception, the evidence improperly obtained is so inseparably entwined with what may have otherwise been obtained, plus the statement that the use has been substantially made in the preparation of

the case, and that it is proposed substantially to use the transcripts in the case, that under the doctrine enunciated by our Supreme Court in the various cases we discussed this morning, that the indictment cannot stand, and we, therefore, move it be dismissed.

The Court: Counsel's very frank statement that he relied heavily upon the testimony of Mr. Stratton to prove his case I think clinches the matter.

There are only two things, three things, as I recall. Mr. Justice Frankfurter, in his language [59] in the Nardone case, says you must first prove unlawful intereception of a message. Here, of course, the question that confronts us is whether it was lawful or unlawful.

I have indicated I would hold it was unlawful.

Then you go on from there, and I think Mr. Justice Frankfurter said, "what was the tainted fruit from this tree," and, of course, the government can come forward and show that it can prove its case without this intercepted information. But I say now, counsel has stated that they would be required to rely upon the testimony of Mr. Stratton.

From now on it merely becomes a matter of mechanics, because I shall hold that the testimony should be, or the information gained from this source should be suppressed.

It is a question whether counsel wants to move for a dismissal of the indictment.

Mr. Holohan: I believe counsel for the defendant has moved for a dismissal.

The Court: Was that included in the motion to suppress?

Mr. Wilmer: There is a motion to dismiss, which has been filed, but it is not a part of this. It goes to the sufficiency of the indictment. [60]

The Court: The sufficiency of the indictment is the pleading, though.

Mr. Wilmer: That is correct. And there is no motion other than the oral motion which I just made, and I believe that motion may be entertained in open court, oral in form, and I intended what I said a moment ago as such a motion, based upon the court's statement, and based upon the evidence as it has been presented, upon the ground that the government cannot be permitted to go forward in an indictment where it is claimed that the forbidden fruit, if I may use that term, is that which has been consumed all along the way.

The Court: It is a matter that should be reviewed.

Mr. Holohan: The government has previously stated its position to the court on this, and our belief that the Federal Communications Commission can monitor, and that in view of that——

The Court: That is where the government and the court disagree.

Mr. Holohan: Disagree, yes.

The Court: I will enter an order, then, dismissing the indictments.

Mr. Holohan: That is with the present indictments? [61]

The Court: Yes. And I think, as we discussed

this morning, it is an appealable order. The government can have an appeal.

Mr. Wilmer: We will agree with that, if it will add anything to the jurisdiction, that it is an appealable order. We will not raise the point that it is not an appealable order.

The Court: You don't have to. The reviewing court will.

All right, that will be the order. [62]

[Endorsed]: Filed June 18, 1954.

[Endorsed]: No. 14405. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Robert V. H. Sugden and Jean S. Sugden, Appellees. Transcript of Record. Appeals from the United States District Court for the District of Arizona.

Filed: June 28, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

U. S. District Court No. C-11555-Phx.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ROBERT V. H. SUGDEN, Defendant.

U. S. District Court No. C-11554-Phx.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ROBERT V. H. SUGDEN and JEAN S. SUGDEN, Defendants.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

Comes Now the United States of America, plaintiff and appellant herein, and states that the following points are relied upon in this appeal:

1. The District Court erred in ruling that the interception by Government agents of radio messages sent by defendants was unlawful.

2. The District Court erred in ordering that testimony and information gained by the Government from intercepted radio messages of defendants should be suppressed.

3. The District Court erred in ordering the Indictments dismissed.

The plaintiff and appellant, United States of America, designates the following record as material to this appeal:

1. Indictment in C-11554 and Counts 1, 6, 8, 12 and 16 of the Indictment in C-11555.
2. Defendants' motion to suppress evidence.
3. Reporter's transcript.
4. Government's Exhibits 1, 2 and 3.
5. Minute entries for C-11554 and C-11555 for the following dates: November 23, 1953, March 25, 1954, March 26, 1954, June 2, 1954 and June 9, 1954.
6. Notice of Appeal in C-11554 and C-11555 for April 23, 1954.
7. Order by District Court to suppress evidence and dismiss Indictments (C-11554 and C-11555).
8. Notice of Appeal (C-11554 and C-11555) for May 11, 1954.
9. Any order by this Court consolidating notices of appeal and/or consolidation of cases on appeal.
10. This designation.

Dated at Phoenix, Arizona, this 28th day of June, 1954.

JACK D. H. HAYS,
United States Attorney for the District of Arizona.

/s/ WILLIAM A. HOLOHAN,
Assistant United States Attorney for the District of Arizona—Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed June 30, 1954. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Causes No. C-11555 and C-11554.]

MOTION FOR CONSOLIDATION OF CASES FOR APPEAL

Comes Now the United States of America, plaintiff and appellant herein, and represents to the Court that the above-entitled cases were ordered consolidated for trial in the District Court, that evidence at a preliminary hearing was taken while the above cases were consolidated, that the trial court ordered both cases dismissed at the same time, that the legal questions presented by this appeal will be identical for both cases, that a separate appeal as to each case will involve an undue burden on the Court and a hardship and additional expense to the Government and defendants;

Now, Therefore, the United States of America moves the Court to order the above-captioned cases consolidated in this appeal for the purposes of printing, briefing, and oral arguments.

JACK D. H. HAYS,
U. S. Attorney for the District of Arizona

WILLIAM A. HOLOHAN,
Assistant U. S. Attorney

/s/ EVERETT L. GORDON,
Assistant U. S. Attorney

So Ordered:

/s/ WILLIAM DENMAN, Chief Judge
/s/ WILLIAM HEALY,
/s/ HOMER T. BONE,
United States Circuit Judges

Acknowledgment of Service attached.

[Endorsed]: Filed July 1, 1954. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Cause No. 11555.]

MOTION FOR CONSOLIDATION OF NOTICES OF APPEAL

Comes Now the United States of America, plaintiff and appellant herein, and represents to the Court that the United States of America by its attorneys filed notice of appeal with the Clerk of the United States District Court for the District of Arizona on the 23rd day of April 1954 giving notice of appeal from the entry of a minute order dismissing the indictment in this cause, and that thereafter on the 5th day of May, 1954 the United States District Court for the District of Arizona signed and filed a formal written order dismissing the indictment in this cause, and that thereafter on the 11th day of May, 1954 the United States of America by its attorneys filed a notice of appeal from the formal written order aforedescribed;

Now, Therefore, the United States of America moves the Court to order the consolidation of the two notices of appeal filed in this cause on the grounds that they pertain to the same matter and a separate appeal as to each notice would provide an undue burden upon the Court.

Respectfully submitted,

JACK D. H. HAYS,
U. S. Attorney for the District of Arizona
WILLIAM A. HOLOHAN,
Assistant U. S. Attorney
/s/ EVERETT L. GORDON,
Assistant U. S. Attorney

So Ordered:

/s/ WILLIAM DENMAN, Chief Judge
/s/ WM. HEALY,
/s/ HOMER T. BONE,
United States Circuit Judges

Acknowledgment of Service attached.

[Endorsed]: Filed July 1, 1954. Paul P. O'Brien, Clerk.

[fol. 87] In United States Court of Appeals for the Ninth Circuit

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Minute Entry of Argument and Submission—February 7, 1955 (Omitted in Printing)

[fol. 88] In United States Court of Appeals for the Ninth Circuit

Minute Entry of Order Directing Filing of Opinion and Filing and Recording of Judgment—September 30, 1955

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 89] In United States Court of Appeals for the Ninth Circuit

No. 14,405

United States of America, Appellant,

vs.

Robert V. H. Sugden and Jean S. Sugden, Appellees

On Appeal from the United States District Court for the District of Arizona

Opinion—September 30, 1955

Before Stephens, Fee and Chambers, Circuit Judges

Chambers, Circuit Judge:

Robert V. H. Sugden is a cotton farmer farming in Arizona near Yuma. His wife Jean assists him in the op-

eration, at least as far as operating their farm radio station is concerned.

On October 7, 1953, Mr. and Mrs. Sugden were jointly indicated for conspiracy to violate the immigration laws. Also, Mr. Sugden alone was indicted for concealing and shielding illegal entrants into the United States from detection. The charges revolve around allegations of employing Mexican nationals, commonly called "wetbacks," on the Sugden farm. It is alleged that they took various steps to hide the illegal entrants and avoid being caught with them in their employ.

Consideration of the case will be shortened if, for the discussion of the case, it is assumed the Sugdens are guilty as charged. Of course, this may not be true at all.

The legally offensive events began in August, 1953, and seem to have culminated on September 18 of the same year.

In the matter of detection, of coaxing witnesses to speak freely upon interrogation before indictment and before [fol. 90] trial, the government was materially aided by the fact that one Robert J. Stratton, an engineer from the Los Angeles office of the Federal Communications Commission, in early September had come into the Yuma area with monitoring devices. With an assistant, Stratton located the Sugden's short wave transmitter. He listened to their broadcast instructions to the overseers in the fields. Apparently some of the instructions involved secreting Mexican nationals, illegally entered, from detection by United States immigration officials. An office of the Immigration Service was located in the town of Yuma and its officers patrolled the area.

The legal requirements for a farmer to operate his own radio station for farming purposes are minimal. He must have a license for his stationary transmitting set and any base operator must have a license.[1] It seems none is required for the operator of the mobile end of the two way radio apparatus. See 47 C.F.R., Chap. I, Parts 11 and 13. Licensing is perfunctory. The licensees must not have been convicted of a felony, etc. Ordinarily the salesman who

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[1] Apparently such an operator gets a restricted radio telephone operator's permit.

sells the radio equipment to the farmer can handle the necessary paper work for the farmer to obtain his station's and operators' licenses. At all times when Stratton was monitoring, Sugden's station was licensed. But the operators' licenses of Mr. and Mrs. Sugden did not arrive or were not effective until September 17, 1953. They had failed to fill out some blank in their application for operators' licenses and so there was delay. The Sugdens make much of the fact they were honestly trying to get licenses before September 17. On this point, it must be said that they were either licensed or unlicensed. Their good intentions could not serve as a substitute for licensing.

Returning to the subject of Stratton's listening, it should be related that he overheard broadcasts of Mr. or Mrs. Sugden which concerned the matter of secreting the wetbacks on September 9, 10 and 18, 1953. Some of the broadcasts were recorded by Stratton. On others he made notes. The contents of all apparently were made available to the Immigration Service and the district attorney. Also, considerable use was made of the broadcast matter before the grand jury.

[fol. 91] At the threshold of trial on separate indictments which were consolidated for trial, the defendantes moved to suppress the evidence obtained from Stratton's monitoring of the Sugden broadcasts. A hearing was had inquiring into the circumstances of Stratton's activities and the involvement of his evidence in the case. Most of the facts elicited are summarized hereinabove. During the hearing the Sugdens' counsel said: "If it please the court, I believe that counsel indicated this morning that the government has made substantial use of these transcripts in the preparation of the cause, and that the government proposed to substantially rely upon the testimony of Mr. Stratton in the presentation of its case." And the prosecutor replied: "That is a correct statement, counsel."

The trial court was of the opinion that the government's activities in developing and prosecuting the case ran counter to 47 U.S.C.A. 605 and granted the motion to suppress. Also, the trial judge quashed the indictments. The government's concession, above quoted, was a factor in quashing of the indictments and suppressing the evidence.

Section 605, above mentioned, reads as follows:

"Unauthorized publication or use of communications

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communica- [fol. 92] tion to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

The government must concede that if the facts were the same save that Stratton had tapped the Sugdens' telephone line and obtained the same information without the Sugdens' consent as he did by monitoring the air waves, then the trial court's rulings were correct. Weiss v. United States, 308 U. S. 321. But the government says listening on the air and wire tapping are different. Therefore, it appeals to this court. It thinks the fact that Stratton had a legal duty to listen in order to find illegal operations under the Federal Communications Act entitled him to turn the information over to other agencies of the government. Also, it is argued in the government's unusually excellent brief that picking up an air wave message and disseminating it as Stratton did is not an interception, is legal and something that Stratton surely and maybe any citizen could do anyway.

Perhaps a few background matters should be disposed of first. It is well to note that the defendants do not contend there was a violation of the Fourth Amendment or the Fifth. This is for the reason that Olmstead v. United States, 277 U. S. 438, is assumed to be the law of the land still. Second, it is to be observed that Section 605 nowhere within its own corners is designated as a rule of evidence. It has [fol. 93] certain civil and criminal significance by virtue of other sections of the Federal Communications Act. 47 U.S.C.A. 153, et seq. It becomes, however, a rule of evidence for federal courts by judicial construction. Nardone v. United States, 302 U. S. 379. Further, Section 605 has applicability to intrastate messages as pointed out in Weiss v. United States, supra.

It seems implicit in the act that agents of the Federal Communications Commission can do some "spying" on the air waves, i.e., intercept.[2] The Commission is charged with enforcing the act. Except by listening, how can the

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[2] A good note on the meaning of "interception" is to be found in 54 Michigan Law Review, 623 (February, 1955). Section 153 of the Act (47 U.S.C.A. 153) pinpoints the definition of wire communication as "between the points of origin and reception." The quoted words take on significance in the cases of recordings of telephone conversations and in the case of a person disclosed to only one con-

Commission tell with certainty that a station is using its assigned frequency?

The purpose of Section 605 is generally said to be to protect the "means"[3] of interstate communication. Goldman v. United States, 316 U. S. 129. At first look, it is difficult to see how a man with a farm radio has any privacy and how silencing him who hears conversations on the farm radio protects any privacy or the means of communication. However, the very limited privacy which Section 605 gives the user of radio for communication may tend to encourage the dispatch of messages via radio over and above the use that would be made of the means if personal messages were part of the public domain available tomorrow, for example, for the commercial purveyor of gossip.

While the telephone does have more privacy than private radio, yet we think that the government agent who moni- [fol. 94] tors cannot make use of the fruits of his monitoring if he finds the station legally on the air and the persons using the station legally authorized to operate it. That is, he can listen for the purpose of enforcing the act and make such use of the information as tends to enforce the act.

Weeks v. United States, 232 U. S. 383, and the two cases of Nardone v. United States, 302 U. S. 379 and 308 U. S. 338, announce rules of evidence which it is assumed Congress may change.

We think here that unless the Congress orders otherwise, the exclusionary rules of Weiss and Goldman, supra, are to be applied to listening in (at least at a point away from the sender and receiver and without the consent of either) on non-public broadcasts by both private individuals and

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verser who listens on an extension line or sits beside a party to the conversation and overhears. Such cases are collected in Flanders v. United States, 6 Cir. 222 F.2d 163.

The same Section 153, defining "radio communication," does not mention the elements of points of origin and reception.

In this court's view on radio, except as to a public broadcast anyone who listens intercepts if he is not a party to the communications or is not with a party.

[3] Herein, we consider the "means" as licensed stations manned by licensed operators.

all public officers save in connection with the Federal Communications Commission's necessary policing for violation of the act. And in connection with such policing, information can be used no further than to effect the policy of the act by criminal prosecution thereunder or by use of other appropriate procedures.

The theory of conduct of the officers in the field in the instant case (although it is said that the Immigration Service did not have the equipment to listen to Sugden's radio) seems to have been, "The Federal Communications Commission can legally listen. So we shall use their ears for what we, the Immigration Service, cannot do." In view of Section 605, we think that if Congress wants the Federal Communications Commission to go into the general crime detection business it should say so. If it wants to authorize the Immigration Service to listen,[4] we assume it may do so. We shall not put either agency there by judicial construction.

Here in Sugden's case a special situation exists as to all of his and Mrs. Sugden's broadcasts save one day's. Although the station was licensed, the two Sugdens were not licensed operators until September 17th. Therefore, they were not legally using the station before September 17th. To throw a mantle of protection provided by Section 605 over an outlaw broadcast is to abandon reason. Therefore, we hold [fol. 95] that as to private radio communications, before any right of privacy exists under Section 605 the voice must be legally on the air; otherwise one who hears, and especially the Federal Communications Commission, may make full disclosure. Giving the one who broadcasts without authority any protection under Section 605 could not tend to protect the means of communication.

Even though divulgence of the content of unlicensed broadcasts is not prohibited by Section 605, there was no attempt in the hearing before the trial court to distinguish between the use made of messages intercepted before September 17th and what was heard thereafter.

It is this court's view that the trial court should reexamine the motions of defendants on the basis that free use of any

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[4] That is, listen and divulge.

radio communications made before September 17th can be made. The district court will need a new hearing before ruling on the suppression of evidence and quashing the indictment. And possibly the court may want to exercise its power to open up the proceedings of the grand jury before it rules on dismissing the indictments.[5] The last-mentioned matter will involve the use of a wise discretion, depending on how the hearing otherwise develops.

Prima facie, the general thesis this court adopts may seem absurd. It may be said that with radio he who broadcasts, in the very nature of things, has no privacy. It may be said that shutting the government's mouth if it listens to the radio in no way protects the means of communication, that is, the instrumentality which is said to be the object of Section 605. If such be true and the end result be not desirable, then the appeal should be made to the Congress. Too much case law already has been built up in the telephone cases for this court to act as a free agent now.

The orders dismissing the causes and suppressing evidence are reversed for proceedings not inconsistent with this opinion.

[fol. 96] In United States Court of Appeals for the Ninth Circuit

No. 14,405

United States of America, Appellant,

vs.

Robert V. H. Sugden and Jean S. Sugden, Appellees

Judgment—Filed and Entered September 30, 1955

Appeal from the United States District Court for the District of Arizona

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

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[5] This court is without knowledge of whether or not grand jury proceedings are stenographically reported in the District of Arizona.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Orders of the said District Court dismissing the causes and suppressing evidence, be, and hereby are reversed, and that this cause be, and hereby is remanded to the said District Court for proceedings not inconsistent with the opinion of this Court.

[File endorsement omitted.]

[fol. 97] In United States Court of Appeals for the Ninth Circuit

No. 14,405

United States of America, Appellant,

vs.

Robert V. H. Sugden and Jean S. Sugden, Appellees

Order Modifying Opinion—Filed November 10, 1955

Before Stephens, Fee and Chambers, Circuit Judges

The opinion filed herein on September 30, 1955, is modified as follows:

(1) The last sentence in the first full paragraph on Page 5 of the printed opinion is modified by striking therefrom the last sentence which reads as follows:

> "The Commission must police for profanity, which is proscribed by the act."

This sentence is eliminated for the reason that it is unnecessary for the decision of the case.

(2) After the word "indictments" in the third sentence of the second paragraph on Page 7 of the printed opinion footnote "5" is added to read as follows:

> "5. This court is without knowledge of whether or not grand jury proceedings are stenographically reported in the District of Arizona."

(S.) Albert Lee Stephens, James Alger Fee, Richard H. Chambers, Circuit Judges.

[File endorsement omitted.]

[fol. 98] In United States Court of Appeals for the Ninth Circuit

Before Stephens, Fee and Chambers, Circuit Judges

Minute Entry of Order Denying Petition for Rehearing —November 10, 1955

On consideration thereof, and by direction of the Court, it is ordered that the petition of Appellees, filed October 26, 1955, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

[fol. 99] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 100] Supreme Court of the United States, October Term, 1955

No. 555

[Title omitted]

Order Allowing Certiorari—Filed January 23, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

DEC 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 555

ROBERT V. H. SUGDEN and
JEAN S. SUGDEN, his wife,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Counsel for Petitioners

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BRYANT W. JONES
Yuma, Arizona

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IN THE

Supreme Court of the United States

October Term, 1955

No._____

ROBERT V. H. SUGDEN and
JEAN S. SUGDEN, his wife,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert V. H. Sugden and Jean S. Sugden, husband and wife, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 30, 1955.

OPINION BELOW

The opinion of the Court of Appeals, (*infra*, Appendix A, pp. 19-26) is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered September 30, 1955. A petition for rehearing was denied on November 10,

1955, (*infra*, Appendix B and C, pp. 27-29) The jurisdiction o this court is invoked under the provisions of 28 U.S.C.A. Sec 1254 (1).

QUESTIONS PRESENTED

1. Whether the unintentional failure by the operator of a farm radio-transmitting station to obtain a "perfunctory" permit as such operator frees the communications so made from the protection of Section 605, 47 U.S.C.A. and in legal effect authorizes agents of the Federal Communications Commission to "wire tap" such communications at the behest of the Department of Justice in aid of an investigation then under way of suspected criminal activity on the part of such operator unrelated to the communications field and renders communications so intercepted admissible in a Federal Court as evidence against such operator.

2. Whether, it appearing without conflict in the evidence that Federal Communications Commission agents had "wire tapped" farm radio communications of petitioners in aid of a criminal investigation not related to the communications field at a time when both station and petitioners were properly licensed and also at times before petitioners had received their applied-for operators' permits and such intercepted communications were indiscriminately used by the Government before the Grand Jury which indicted petitioners and in trial preparation, the trial judge committed error in suppressing the evidence so obtained and used and dismissing the indictment when the Government made no offer or effort (a) to disprove that the evidence concededly illegally obtained (by the Court of Appeals) played a substantial part in causing the Grand Jury to indict; (b) to disprove that such evidence so obtained was a substantial factor in the trial preparation of the Government, or (c) to convince the trial court that such illegally intercepted evidence would not be used on the trial of the action and that evidence, free from the taint of illegality was at the disposal of the Government to prove its case.

3. Whether agents of the Federal Communications Commission are authorized to "wire tap," i.e., intercept and listen to radio communications transmitted by a private radio installation without limitation, for the purpose of determining if (a) the radio apparatus is being used for the purpose for which it has been licensed by the Federal Communications Commission, or (b) if the radio is being used to broadcast profanity or obscenity or for an unlawful purpose or a purpose for which the equipment is unlicensed and whether, having so listened in on private communications, the evidence so obtained may be employed in a Federal Court by the Government before the Grand Jury in securing indictments, in developing witnesses in building its case and as evidence on the actual trial of the case so developed.

STATUTES AND REGULATIONS INVOLVED

Sections 303, 312, 326, 501, 605, Title 47 U.S.C.A.

Chapter 71, Title 18, Sec. 1461, U.S.C.A.

Section 259a, Chapter 6, Title 39, 1954 Cum. Pocket Part Set forth verbatim in Appendix D, pp 29-40.

STATEMENT

The basic facts are:

Petitioner, Robert V. H. Sugden, prior to June of 1953, contacted one Bud Bridges, technician and salesman for Motorola in the Yuma, Arizona, area, with respect to purchasing a two-way radio transmitting apparatus for use on farm vehicles such as pickup trucks, with the result such an apparatus was purchased from Motorola. Petitioners knew of the outstanding position of Motorola in the radio and electronics field, knew nothing of Federal Communications Commission law or regulations and depended entirely upon Bridges for technical advice. He completed their station license application and such license issued August 26,

1953. Bridges told petitioners operators' permits would be necessary, that no examination was required and that he, Bridges, would take care of securing them. A paper accompanied the station license which contained, among other statements, one to the effect that operators' permits were held, or were being obtained—and petitioners assumed Bridges was taking care of the matter.

After the station license arrived Bridges left some forms, told petitioners to fill them out and send them in. *The station was then in operation and Bridges did not warn petitioners such use was illegal until their permits arrived.* Petitioners completed the forms and sent them in September 9th, but due to their failure to complete the forms properly they were returned for completion with the result their actual permits were in the hands of petitioners September 17th.

The technician for the Yuma County Sheriff, Kieling, who acted as technician for the installation of the unit, testified he made a final check of the station September 8th and told petitioners to finish the completion form when they got their permits and send it in. He further testified he told Robert Sugden in July he could not hook up the *station* because he did not have his *station* license but did tell him how to hook it up himself. The most this witness told petitioners was that he could not fill out their completion report as they did not have their operators' permits. *He at no time warned petitioners not to operate the station until the permits arrived* and the station was openly in operation.

These operators' permits issue as a matter of course without examination if the applicant indicates American citizenship, no felony history and familiarity with the regulations of the Federal Communications Commission. In fact, the Commission can waive issuance of these permits if it finds such to be in the public interest. (Section 318)

The station operated between its location in the Sugden home where Mrs. Sugden operated it along with taking care of her

household duties, and mobile units in trucks with the operators of the trucks talking back and forth with the operator in the Sugden home. No operators' permits are required of the person using the unit in the truck to talk with the central station.

On September 4, 1953, Robert J. Stratton, assistant engineer in charge of the Eleventh District Office of the Federal Communications Commission with headquarters in Los Angeles, came to Yuma, Arizona, with equipment designed to intercept and listen to radio communications on direction of the Washington office of the Federal Communications Commission to make an investigation of petitioners' activities by reason of a complaint by the Department of Justice, which in turn was based upon a complaint by the Immigration Service. He contacted the Immigration Service upon arrival and proceeded to listen in on petitioners' conversations by radio. As to petitioner Robert V. H. Sudgen, all of his conversations at all times were lawfully carried on, since he did not operate the central station and no permits were required of the persons using the mobile unit (unless it be contended as to the conspiracy indictment that the acts of Jean S. Sugden in transmitting signals without a permit was also the act of Robert as a claimed co-conspirator. It is suggested the failure to seasonably obtain a permit was not an act in furtherance of the claimed conspiracy and played no part therein and hence such omission being unrelated to the conspiracy would not bring Robert within the familiar rule.)

Stratton made notes of this first interception, which were promptly turned over to the Immigration Service. Stratton returned with a partner on the 10th of September and again on the 18th of September upon which two occasions the intercepted conversations were transcribed and copies of such transcriptions promptly turned over to the Immigration Service.

Stratton testified before the Grand Jury as to the substance of each conversation so intercepted and copies were made available to the United States Attorney who used them in confronting and

questioning employees of petitioners, some of whom also testified before the Grand Jury which returned the indictments here involved accusing petitioners jointly substantially of conspiracy (with various of their employees not charged) to conceal and shield from detection aliens illegally in the United States through the use of radio equipment used to warn the various co-conspirators that Immigration officers were on their way to various cotton fields so that such co-conspirators could drive to the field and warn the "wetbacks" to hide. Various overt acts, not here material, were alleged. Petitioner Robert V. H. Sugden was also accused of shielding and concealing certain named aliens illegally. The two indictments were consolidated for trial by stipulation.

Petitioners seasonably moved to suppress all evidence gained by the Government through these "wire tap" operations, which motion was heard prior to trial, upon which hearing the facts as above set forth appeared. It also appearing on the hearing that this evidence illegally gained was employed by the Government in securing the Grand Jury indictments, petitioners moved orally in open court to dismiss the indictments, which motions were granted by the trial judge.

The Court of Appeals reversed holding that the transcription of September 18th, after the operators' permits were issued, was illegally made, but that the failure of petitioners to hold operators' permits during the September 4th and 10th interceptions put them beyond the protection of the law and declared public policy forbidding "wire tapping" and rendered this evidence available to the Government. The court suggested that a new hearing be held to separate out the bad from the good with the trial court giving consideration to opening up the proceedings before the Grand Jury to determine how much the minds of the Grand Jurors were swayed by the "tainted" fruit.

Petition for Rehearing was denied November 10, 1955.

REASONS FOR GRANTING THE WRIT

1. The ruling below sanctions (and requires acceptance and approval by the trial court) of conduct by federal officers and the Department of Justice in defiance of declared public policy (both by the Congress and this Court) "through resort to methods deemed inconsistent with ethical standards and destructive of personal liberty" by a practice "* * * which involves a grave wrong." *Nardone vs. U. S.*, 82 L. ed. 314, 317, 58 S. Ct. 275, 302 U. S. 379.

2. The Circuit Court has decided an important question of federal law which has not been, but should be, settled by the Supreme Court; first, the extent to which and when Federal Communications Commission agents can listen in on radio conversations and thereafter divulge the information so obtained; secondly, if the distinction drawn by the Court of Appeals as to the effect of no operators' permits is valid, what is the proper proceeding to be followed by the court when it appears illegal evidence has been used by the Government indiscriminately with legal evidence and the Government makes no effort to show how much the illegal evidence influenced the indictment and aided in trial preparation.

3. The ruling of the Circuit Court is in conflict with the apparent ruling of the Supreme Court in *Nardone vs. U. S.*, supra.

4. The ruling of the Circuit Court for the Ninth Circuit is in conflict with the rulings of the Circuit Court for the Second Circuit in *U. S. vs. Coplon*, 185 F. 2d 629, certiorari denied, 72 S. Ct. 362, 342 U. S. 920, 16 L. ed. 690, as to the proper procedure under the circumstances disclosed herein, Point 2, supra.

POINT 1.

The Circuit Court has weighed in the scales of justice the innocent and unintentional failure of Jean S. Sugden in justifiable reliance upon the Motorola representative to wait for the arrival

of her applied-for "perfunctory" permit (to employ the characterization of these permits by the Circuit Court) before she opened the switch and spoke into the transmitter, against conduct which this Court has condemned as contrary to public policy and inconsistent with ethical standards, which course of conduct was purposely entered into by federal officers, and has adjudged that an innocent technical oversight outweighs a purposeful ignoring of the law.

Section 501 of the Communications Act makes criminal failure to hold an operator's permit when operating radio equipment (among other things) only when such omission is wilful and knowing. "Any person who wilfully and knowingly does or causes to be done any act * * * in this chapter prohibited * * * or who wilfully and knowingly omits or fails to do any act * * * in this chapter required * * * shall, upon conviction thereof * * * be punished for such offense * * * by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both * * *."

By no construction of the evidence can the omission of petitioners to hold permits be considered other than inadvertent and pure ignorance. No improper purpose can be ascribed to their conduct for the omission served no purpose as advancing their claimed criminal purpose; the use was open and in reliance upon one (Bud Bridges) upon whom they were entitled to rely. Indeed there accompanied the station license from the Federal Communications Commission "another little paper * * * that had five or six statements on it, and one of them was that operators' licenses were held *or being obtained.*" Certainly if their acts were unlawful petitioners might have expected Bridges to warn them to that effect and the technician, Keiling, who, while acting as a technician, was associated with the sheriff's office merely told petitioners he could not complete the completion form since their permits had not arrived. Unless the record supports a finding of criminal purpose in the omission relied upon,

plainly the Court of Appeals attached an improper significance to the omission.

Even the most biased mind could not find evidence or inferences therefrom to even hint at such a purpose.

In contrast to this type of inadvertent omission, the purpose of Stratton in going to Yuma and of his superiors in sending him there, was not to discover if petitioners had operators' permits—their own records would have disclosed that—and, in fact, *in the course of the "wire tapping" procedures on the part of Stratton the operators' permits were in fact issued to petitioners;* his purpose was to "wire tap" petitioners' conversations regardless of whether the station was licensed or petitioners held operators' permits.

These federal officers knew that this Court in *Weiss vs. U. S.*, 308 U. S. 321, 84 L. ed. 298, 60 S. Ct. 269, had declared the prohibitions of Section 605 (47 U.S.C.A. 605) applied to intra-state communications and that the permissible course of conduct of federal law enforcement agencies in relation to Section 605 was declared by this Court in *Nardone vs. U. S.*, supra.

The history of Section 605 warranted no conclusion that radio communications were, somehow, by reason of their peculiar susceptibility to interception, intended to be exempted from the provisions of Section 605, for Section 605 was originally a part of the statutory regulation of radio and was not extended to cover and protect telegraphed and telephoned messages until the creation of the Federal Communications Commission and the consolidation of supervision over radio, telephone and telegraph in the Federal Communications Commission. *Nardone vs. U. S.*, supra.

Even a casual reading of Section 605 warrants no conclusion that the Congress intended to exempt agents of the Federal Communications Commission (as distinguished from other federal law enforcement agencies) from its provisions. The proviso clause

exempts certain definite communications—none other—and it is well-established that a proviso in normal usage *makes the general enacting clause of a statute to which it is attached applicable to everything subject thereto* and not exempted by the proviso.

George Moore Ice Cream Co. vs. Rose, 289 U. S. 373, 53 S. Ct. 522, 77 L. ed. 1265.

McDonald vs. U. S., 279 U. S. 12, 49 S. Ct. 218, 73 L. ed. 582.

White vs. U. S., 191 U. S. 545, 24 S. Ct. 171, 48 L. ed. 295.

There is nothing in the statute which confers its powers upon the Federal Communications Commission which even hints at such activity upon its part. Section 303 of Title 47 indicates no purpose on the part of the Congress to create a super police agency within our land with a lawful "ear" at the "keyhole" of every operator of a radio transmitter so long as the ear be placed there under the guise of listening for obscenity or profanity, to determine if the station is operating within its license or to detect some unlawful activity.

The logical result of such a conclusion as suggested by the Court of Appeals must be that the agents of the Commission may at all times lawfully listen in on radio conversations to determine if the station is operating lawfully and for a lawful purpose. Logically, therefore, under the familiar rule that evidence come upon by federal officers acting lawfully can be employed in Federal Courts even though under other circumstances it would be denied admissibility (*Marron vs. U. S.,* 72 L. ed. 231, 48 S. Ct. 74, 275 U. S. 192 (annotated 72 L. ed. 231)) it follows that *all* intercepted communications may be disclosed. If it be contended that only such interceptions may be disclosed as evidence profanity, obscenity, unlawful conduct, or operation of the station in violation of the license, we then have the rather unusual situation arising of the legality of the officer's act depending upon whether he thereby chances upon some wrongful

conduct which in turn relates back and purifies an act which but for such windfall (to the officer) would have been wrongful and illegal.

Of course Section 605 prohibits interception *and* disclosure so it may be contended that interception is freely permitted and it is only wrongful when disclosure follows interception. Such is not the intent of Section 605. The prohibition is against *both* interception and divulgence. Plainly a communication could not be divulged unless it has been first intercepted by someone. If the Congress had intended that the divulgence only was to be prohibited it would have been very simple for it to have said so. But it did not do so, for it followed up the prohibition against interception *and* divulgence with a prohibition aimed *solely* against divulging communications wrongfully intercepted with knowledge of such wrongful interception. Finally, such a construction would put a lawful "peeping Tom" at the window of every private station privileged to privately enjoy such a violation of the right of privacy, enjoined only to satisfy the lust of such viewer privately.

Section 303(m), which details the causes for which the Commission may revoke a permit, contains no language to indicate the Congress contemplated agents of the Commission would censor or monitor communications for the purpose of determining if some crime might be in the making. The Congress specified six general causes for which a license of an operator might be suspended:

1. Violation of any Act, treaty or convention binding on the United States which the Commission is authorized to administer or any regulation made by the Commission under any such Act, treaty or convention;

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2. Failure to carry out a lawful order of the master lawfully in charge of the ship or aircraft whereon the licensee is employed;

3. Willfully damaging or permitting radio apparatus o installations to be damaged;

4. Transmitting superfluous radio communications or com munications containing profane or obscene words or language or knowingly transmitting false or deceptive signals or communi cations or a call signal or letter not assigned to the station being operated;

5. Wilful or malicious interference with any other radio communications or signals; and

6. Obtaining or attempting to obtain or assisting another in obtaining or attempting to obtain operator's license by fraud.

It is significant that subdivision 1 above does not extend the power of the Commission to revoke an operator's license for violation of any law but only for violation of any Act, treaty or convention binding upon the United States which the Commission is authorized to administer or for violation of any regulation made by the Commission under any *such* Act, treaty or convention. The use of the word "such" in connection with regulations made by the Commission clearly relates back to limit the word "Act" to such Acts as the Commission is authorized to administer.

Certainly had the Congress contemplated that the Federal Communications Commission was to serve as an arm of the Department of Justice in enforcing our criminal statutes, here would have been the place to authorize it to suspend or revoke the license if the operator thereof was using the same in furtherance of some criminal scheme or conspiracy.

We respectfully urge the Court of Appeals has overlooked the basic underlying principle which condemns a practice such as here indulged in by the Government; has overlooked the fact that *a mere technical non-criminal omission of these petitioners cannot make something morally right which in its very essence is*

morally wrong; cannot make something lawful which in its very nature is abhorrent to law and decency.

The Court of Appeals concludes:

"It seems implicit in the Act that agents of the Federal Communications Commission can do some 'spying' on the air waves, i.e., intercept * * *"

Nowhere can we find any authority in the Commission spelled out directly or indirectly to spy for anything. Indeed, the prohibition against use of indecent language has been lifted out of the Act and transferred to Title 18, Chapter 71, Section 1464. Nowhere is there any indication that obscenity by radio communication is to be policed in any fashion different than obscenity by mailing obscene matter condemned by Section 1461, Chapter 71, Title 18, U.S.C.A.

By like course of reasoning, does the Post Office Department have the right to "sample" private mailings to see if perchance some illegal activity is to be found thereby; to do some "spying" to ascertain if non-mailable matter is being transported in violation of the express prohibitions of Section 259a, Chapter 6, Title 39 U.S.C.A.? By the same line of reasoning as the Court of Appeals applied to radio communication, we reach the unhappy conclusion that our postmaster or letter carrier has carte blanche to open and read our most private correspondence on a "night ride" for obscenity or crime-inciting matter in the mails. True it is that Section 303(d) authorizes the Commission to revoke the operator's license of one transmitting obscene words but so does Section 259a, Chapter 6, Title 39, U.S.C.A. (1954 Cum. Pocket Part) authorize the Postmaster to exclude from the mails obscene solicitation matter, and Section 1461, Title 18 requires that non-mailable obscene matter "shall not be conveyed in the mails or delivered from any post office *or by any letter carrier.*" (Emphasis supplied)

The purpose of the "wire tapping" was not to ascertain if a unlicensed station was operating or if unlicensed operators were transmitting or if an unassigned frequency was being employed the purpose was to (in cooperation with the Department of Justice and in direct defiance of said Section 605) intercept and divulge communications *without reference to or regard for* whether the station or the operators were licensed or unlicensed. Indeed, in the course of the "wire tapping" procedures operators' licenses were issued to petitioners, so plainly the Federal Communications Commission and its officials were not concerned with this phase of petitioners' activities.

Weighing then in the balance of propriety the simple oversight of the petitioners to obtain a "perfunctory" permit against the purposeful, deliberate disregard of a statute of the United States and the denunciations by this Court of "dirty business" in law enforcement, can it be said the trial court should have countenanced such conduct?

This is not evidence stumbled upon in the course of a lawful discharge of duties imposed by law upon the Federal Communications Commission; *this is evidence purposefully sought out in direct defiance of law.* Would it be said that because one operating an unlicensed motor vehicle upon the highway without an operator's license thereby becomes subject to unlawful search and seizure because he is unlawfully upon the highway and has no right to be driving the vehicle? Would the Government contend the police authorities might arbitrarily stop all motorists and search their vehicles with the legality of such action turning upon the chance of the presence or absence of a driver's license in each instance?

We respectfully urge that the technical and innocent oversight of petitioners in failing to properly fill out a form for a "perfunctory" permit does not make them "outlaws of the ether highways," shorn of all the rights of a citizen of the United States, to be "shot on sight" by Federal Communications Commission agents

stalking them, not as unlicensed operators of communications equipment and for that delinquency, but in cooperation with the Department of Justice and the Immigration Service for the claimed offense of concealing aliens—a matter generally accepted as somewhat beyond the jurisdiction of the Federal Communications Commission.

POINTS 2, 3 and 4

These three points can be considered together to avoid repetition. Should the conclusion reached by the Courts of Appeals as to the effect of the failure of Jean S. Sugden to hold an operator's license be found unsound, then a consideration of these points becomes unnecessary.

There is no argument but that, tested by the judgment of the Court of Appeals, Stratton unlawfully intercepted the conversations of September 18th. The station was licensed; both petitioners then had their permits.

There is no conflict in the evidence that petitioner Robert V. H. Sugden did not operate the central station; his use was in the field on the mobile end of the equipment installation where a permit was not required and the station used was at all times fully licensed.

There is no conflict in the evidence as to the fact that Stratton related this conversation of September 18th to the Grand Jury, a transcription thereof was supplied to the Immigration Service and the United States Attorney and was used in interrogating witnesses, as the Court of Appeals says:

> "In the matter of detection, of coaxing witnesses to speak freely upon interrogation before indictment and before trial, the government was materially aided by the fact one Robert J. Stratton * * * had come into the Yuma area with monitoring devices."

and that the Government proposed to use the various transcriptions on the trial of the cause.

Petitioners seasonably moved to suppress all of these transcriptions and related evidence.

Petitioners, pursuant to the rule laid down by this Court in *Nardone vs. U. S.*, supra, as interpreted by the Second Circuit in *the Coplon case*, supra, clearly established that substantial evidence condemned as illicitly obtained by the test as to illegality established by the Court of Appeals in its opinion, was employed by the Government before the Grand Jury in securing the indictments quashed by the District Judge and in preparing its case against petitioners; and further, that it would use such evidence on the trial of the cause. These facts appearing to the satisfaction of the District Judge, we respectfully urge the burden fell upon the Government to satisfy the District Judge:

(a) That the indictments were untainted by the use of such unlawful evidence;

(b) That such evidence, so unlawfully obtained, did not play any substantial part in building the Government's case, directly or indirectly;

(c) That the evidence which the Government proposed to offer on the trial of the cause was obtained from independent sources untainted by and not traceable to such unlawful interception and divulgence.

Accepting for the purpose of this argument the distinction drawn by the Court of Appeals between communications sent by an unlicensed operator and a licensed operator, it is clear that there were two recordings made by Stratton, one when the operator's permit was in effect, one when such permits were only applied for. *The Government knew which of these transcriptions it had employed in building its case and in obtaining these indictments. It knew which of these it proposed to use on the trial of the action. These petitioners were not so advised.*

Overt Act No. 5 of the Indictment for conspiracy charges the September 18th use of the radio as an act in furtherance of the conspiracy so conclusively the transcription of this date was presented to the Grand Jury. Count 18 of the Indictment of Robert Sugden is apparently likewise based upon this transcription.

The rule which the Court of Appeals has declared as to the effect of the lack of a proper license had been theretofore declared in the Ninth Circuit in *Casey vs. U. S.*, 191 F. 2d 1, and was known to the Government.

Yet the Government made no effort or offer to show that the indictments were untainted by this unlawful evidence or that it could proceed with lawful evidence arising from a lawful source.

Stratton testified that he did in fact relate the entire interception procedure to the Grand Jury:

"A. Well my testimony was a running account of what had happened from the time we were first called in on the case." (T. R. 40)

* * * * * * * * * *

"Q. Other than testifying how you went about doing your monitoring, that is, describing your various steps in setting up your equipment, and that sort of thing, the balance of your testimony related to the substance of the conversations which you had intercepted through your monitoring equipment?

"A. That is correct, the general use of the radio in that particular case." (T. R. 41)

How could the District Judge remove this taint from the indictment; how could he ascertain what effect the unlawful testimony had upon the minds of the Grand Jurors?

Clearly as to the petitioner Robert V. H. Sugden *all* interceptions were unlawful, since he at no time was acting as operator

of the station, so under any interpretation of the facts and law—unless the Federal Communications Commission is free to "spy" as it chooses—the action of the trial judge was correct.

CONCLUSION

The ruling below violates the spirit and intent of Section 605 and is at variance with procedure indicated by this Court as interpreted by the Second Circuit. We respectfully petition therefore that the writ herein prayed for issue.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States of America, *Appellant,* vs. Robert V. H. Sugden and Jean S. Sugden, *Appellees.*	No. 14,405 Sept. 30, 1955

On Appeal from the United States District Court for the District of Arizona.

Before: STEPHENS, FEE AND CHAMBERS, Circuit Judges.
CHAMBERS, Circuit Judge:

Robert V. H. Sugden is a cotton farmer farming in Arizona near Yuma. His wife Jean assists him in the operation, at least as far as operating their farm radio station is concerned.

On October 7, 1953, Mr. and Mrs. Sugden were jointly indicted for conspiracy to violate the immigration laws. Also, Mr. Sugden alone was indicted for concealing and shielding illegal entrants into the United States from detection. The charges revolve around allegations of employing Mexican nationals, commonly called "wetbacks," on the Sugden farm. It is alleged that they took various steps to hide the illegal entrants and avoid being caught with them in their employ.

Consideration of the case will be shortened if, for the discussion of the case, it is assumed the Sugdens are guilty as charged. Of course, this may not be true at all.

The legally offensive events began in August, 1953, and seem to have culminated on September 18 of the same year.

In the matter of detection, of coaxing witnesses to speak freely upon interrogation before indictment and before trial, the government was materially aided by the fact that one Robert J. Stratton, an engineer from the Los Angeles office of the Federal Communications Commission, in early September had come into the Yuma area with monitoring devices. With an assistant, Stratton located the Sugdens' short wave transmitter. He listened to their broadcast instructions to the overseers in the fields. Apparently some of the instructions involved secreting Mexican nationals, illegally entered, from detection by United States immigration officials. An office of the Immigration Service was located in the town of Yuma and its officers patrolled the area.

The legal requirements for a farmer to operate his own radio station for farming purposes are minimal. He must have a license for his stationary transmitting set and any base operator must have a license.[1] It seems none is required for the operator of the mobile end of the two way radio apparatus. See 47 C.F.R., Chap. I, Parts 11 and 13. Licensing is perfunctory. The licensees must not have been convicted of a felony, etc. Ordinarily the salesman who sells the radio equipment to the farmer can handle the necessary paper work for the farmer to obtain his station's and operators' licenses. At all times when Stratton was monitoring, Sugden's station was licensed. But the operators' licenses of Mr. and Mrs. Sugden did not arrive or were not effective until September 17, 1953. They had failed to fill out some blank in their application for operators' licenses and so there was delay. The Sugdens make much of the fact they were honestly trying to get licenses before September 17. On this point, it must be said that they were either licensed or unlicensed. Their good intentions could not serve as a substitute for licensing.

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[1]Apparently such an operator gets a restricted radio telephone operator's permit.

Returning to the subject of Stratton's listening, it should be related that he overheard broadcasts of Mr. and Mrs. Sugden which concerned the matter of secreting the wetbacks on September 9, 10 and 18, 1953. Some of the broadcasts were recorded by Stratton. On others he made notes. The contents of all apparently were made available to the Immigration Service and the district attorney. Also, considerable use was made of the broadcast matter before the grand jury.

At the threshold of trial on separate indictments which were consolidated for trial, the defendants moved to suppress the evidence obtained from Stratton's monitoring of the Sugden broadcasts. A hearing was had inquiring into the circumstances of Stratton's activities and the involvement of his evidence in the case. Most of the facts elicited are summarized hereinabove. During the hearing the Sugdens' counsel said: "If it please the court, I believe that counsel indicated this morning that the government has made substantial use of these transcripts in the preparation of the cause, and that the government proposed to substantially rely upon the testimony of Mr. Stratton in the presentation of its case." And the prosecutor replied: "That is a correct statement, counsel."

The trial court was of the opinion that the government's activities in developing and prosecuting the case ran counter to 47 U.S.C.A. 605 and granted the motion to suppress. Also, the trial judge quashed the indictments. The government's concession, above quoted, was a factor in quashing of the indictments and suppressing the evidence.

Section 605, above mentioned, reads as follows:

"Unauthorized publication or use of communications

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning there-

of, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

The government must concede that if the facts were the same save that Stratton had tapped the Sugdens' telephone line and obtained the same information without the Sugdens' consent as he did by monitoring the air waves, then the trial court's rulings were correct. Weiss v. United States, 308 U.S. 321. But the government says listening on the air and wire tapping are different. Therefore, it appeals to this court. It thinks the fact that Stratton had a legal duty to listen in order to find illegal operations under the Federal Communications Act entitled him to turn the information over to other agencies of the government. Also, it is argued in the government's unusually excellent brief that

picking up an air wave message and disseminating it as Stratton did is not an interception, is legal and something that Stratton surely and maybe any citizen could do anyway.

Perhaps a few background matters should be disposed of first. It is well to note that the defendants do not contend there was a violation of the Fourth Amendment or the Fifth. This is for the reason that Olmstead v. United States, 277 U.S. 438, is assumed to be the law of the land still. Second, it is to be observed that Section 605 nowhere within its own corners is designated as a rule of evidence. It has certain civil and criminal significance by virtue of other sections of the Federal Communications Act. 47 U.S.C.A. 153, et seq. It becomes, however, a rule of evidence for federal courts by judicial construction. Nardone v. United States, 302 U.S. 379. Further, Section 605 has applicability to intrastate messages as pointed out in Weiss v. United States, supra.

It seems implicit in the act that agents of the Federal Communications Commission can do some "spying" on the air waves, i.e., intercept.[2] The Commission is charged with enforcing the act. Except by listening, how can the Commission tell with certainty that a station is using its assigned frequency? The Commission must police for profanity, which is proscribed by the act.

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[2]A good note on the meaning of "interception" is to be found in 54 Michigan Law Review, 623 (February, 1955). Section 153 of the Act (47 U.S.C.A. 153) pinpoints the definition of wire communication as "between the points of origin and reception." The quoted words take on significance in the cases of recordings of telephone conversations and in the case of a person disclosed to only one converser who listens on an extension line or sits beside a party to the conversation and overhears. Such cases are collected in Flanders v. United States, 6 Cir. 222 F.2d 163.

The same Section 153, defining "radio communication," does not mention the elements of points of origin and reception.

In this court's view on radio, except as to a public broadcast anyone who listens intercepts if he is not a party to the communications or is not with a party.

The purpose of Section 605 is generally said to be to protect the "means"[3] of interstate communication. Goldman v. United States, 316 U.S. 129. At first look, it is difficult to see how a man with a farm radio has any privacy and how silencing him who hears conversations on the farm radio protects any privacy or the means of communication. However, the very limited privacy which Section 605 gives the user of radio for communication may tend to encourage the dispatch of messages via radio over and above the use that would be made of the means if personal messages were part of the public domain available tomorrow, for example, for the commercial purveyor of gossip.

While the telephone does have more privacy than private radio, yet we think that the government agent who monitors cannot make use of the fruits of his monitoring if he finds the station legally on the air and the persons using the station legally authorized to operate it. That is, he can listen for the purpose of enforcing the act and make such use of the information as tends to enforce the act.

Weeks v. United States, 232 U.S. 383, and the two cases of Nardone v. United States, 302 U.S. 379 and 308 U.S. 338, announce rules of evidence which it is assumed Congress may change.

We think here that unless the Congress orders otherwise, the exclusionary rules of Weiss and Goldman, supra, are to be applied to listening in (at least at a point away from the sender and receiver and without the consent of either) on non-public broadcasts by both private individuals and all public officers save in connection with the Federal Communications Commission's necessary policing for violation of the act. And in connection with such policing, information can be used no further than to effect

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[3]Herein, we consider the "means" as licensed stations manned by licensed operators.

the policy of the act by criminal prosecution thereunder or by use of other appropriate procedures.

The theory of conduct of the officers in the field in the instant case (although it is said that the Immigration Service did not have the equipment to listen to Sugden's radio) seems to have been, "The Federal Communications Commission can legally listen. So we shall use their ears for what we, the Immigration Service cannot do." In view of Section 605, we think that if Congress wants the Federal Communications Commission to go into the general crime detection business it should say so. If it wants to authorize the Immigration Service to listen,[4] we assume it may do so. We shall not put either agency there by judicial construction.

Here in Sugden's case a special situation exists as to all of his and Mrs. Sugden's broadcasts save one day's. Although the station was licensed, the two Sugdens were not licensed operators until September 17th. Therefore, they were not legally using the station before September 17th. To throw a mantle of protection provided by Section 605 over an outlaw broadcast is to abandon reason. Therefore, we hold that as to private radio communications, before any right of privacy exists under Section 605 the voice must be legally on the air; otherwise one who hears, and especially the Federal Communications Commission, may make full disclosure. Giving the one who broadcasts without authority any protection under Section 605 could not tend to protect the means of communication.

Even though divulgence of the content of unlicensed broadcasts is not prohibited by Section 605, there was no attempt in the hearing before the trial court to distinguish between the use made of messages intercepted before September 17th and what was heard thereafter.

It is this court's view that the trial court should reexamine

[4]That is, listen and divulge.

the motions of defendants on the basis that free use of any radio communications made before September 17th can be made. The district court will need a new hearing before ruling on the suppression of evidence and quashing the indictment. And possibly the court may want to exercise its power to open up the proceedings of the grand jury before it rules on dismissing the indictments. The last-mentioned matter will involve the use of a wise discretion, depending on how the hearing otherwise develops.

Prima facie, the general thesis this court adopts may seem absurd. It may be said that with radio he who broadcasts, in the very nature of things, has no privacy. It may be said that shutting the government's mouth if it listens to the radio in no way protects the means of communication, that is, the instrumentality which is said to be the object of Section 605. If such be true and the end result be not desirable, then the appeal should be made to the Congress. Too much case law already has been built up in the telephone cases for this court to act as a free agent now.

The orders dismissing the causes and suppressing evidence are reversed for proceedings not inconsistent with this opinion.

(Endorsed:) Opinion. Filed Sep. 30, 1955.

Paul P. O'Brien, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* *vs.* ROBERT V. H. SUGDEN and JEAN S. SUGDEN, *Appellees.*	No. 14,405

JUDGMENT

Appeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Orders of the said District Court dismissing the causes and suppressing evidence, be, and hereby are reversed, and that this cause be, and hereby is remanded to the said District Court for proceedings not inconsistent with the opinion of this Court.

(ENDORSED) Judgment

Filed and Entered: September 30, 1955

PAUL P. O'BRIEN, Clerk.

ORDER MODIFYING OPINION

Before: STEPHENS, FEE AND CHAMBERS, Circuit Judges

The opinion filed herein on September 30, 1955, is modified as follows:

(1) The last sentence in the first full paragraph on Page 5 of the printed opinion is modified by striking therefrom the last sentence which reads as follows:

"The Commission must police for profanity, which is proscribed by the act."

This sentence is eliminated for the reason that it is unnecessary for the decision of the case.

(2) After the word "indictments" in the third sentence of the second paragraph on Page 7 of the printed opinion footnote "5" is added to read as follows:

"5. This court is without knowledge of whether or not grand jury proceedings are stenographically reported in the District of Arizona."

ALBERT LEE STEPHENS

JAMES ALGER FEE

RICHARD H. CHAMBERS

Circuit Judges

(ENDORSED) Filed

November 10, 1955

PAUL P. O'BRIEN,

Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, November 10, 1955

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellees, filed October 26, 1955, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

APPENDIX D

SEC. 303, Chapter 5, Title 47 U.S.C.A.

§303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect t its external effects and the purity and sharpness of the emission from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice

to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary

to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party. (June 19, 1934, c. 652, § 303, 48 Stat. 1082, as amended May 20, 1937, c. 229, § § 5, 6 (a, b), 50 Stat. 190, 191.)

SEC. 312, Chapter 5, Title 47, U.S.C.A.

§312. Administrative sanctions—Revocation of station license or construction permit

(a) Any station license or construction permit may be revoked—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in resfusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe, any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States; and

(5) for violation of or failure to observe any cease and desist order issued by the Commission under this section.

Cease and desist orders

(b) Where any person (1) has failed to operate substantially as set forth in a license, or (2) has violated or failed to observe

any of the provisions of this chapter, or (3) has violated or fail to observe any rule or regulation of the Commission authorized this chapter or by a treaty ratified by the United States, the Co mission may order such person to cease and desist from such actio

Order to show cause

(c) Before revoking a license or permit pursuant to subsectio (a) of this section, or issuing a cease and desist order pursuant subsection (b) of this section, the Commission shall serve upo the licensee, permittee, or person involved an order to show caus why an order of revocation or a cease and desist order should no be issued. Any such order to show cause shall contain a statemen of the matters with respect to which the Commission is inquirin and shall call upon said licensee, permittee, or person to appea before the Commission at a time and place stated in the order, bu in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

Burden of proof

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

Procedure for issuance of cease and desist order

(e) The provisions of section 1008 (b) of Title 5 which apply with respect to the institution of any proceeding for the

revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order. June 19, 1934, c. 652, § 312, 48 Stat. 1086, amended July 16, 1952, c. 879 § 10, 66 Stat. 716.

SEC. 326, Chapter 5, Title 47, U.S.C.A.

§ 326. Censorship

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. June 19, 1934, c. 652, § 326, 48 Stat. 1091, amended June 25, 1948, c. 645, § 21, 62 Stat. 862.

SEC. 501, Chapter 5, Title 47, U.S.C.A

SUBCHAPTER V. PENAL PROVISIONS: FORFEITURES

§ 501. General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or

by imprisonment for a term not exceeding two years, or both. June 19, 1934, c. 652, § 501, 48 Stat. 1100; as amended Mar. 23, 1954, c. 104, 68 Stat. 30.

SEC. 605, Chapter 5, Title 47, U.S.C.A.

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmittting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving,

divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, § 605, 48 Stat. 1103.)

SEC. 1461, Chapter 71, Title 18, U.S.C.A.

§ 1461. Mailing obscene or crime-inciting matter

Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination. June 25, 1948, c. 645, 62 Stat. 768.

SEC. 1463, Chapter 71, Title 18, U.S.C.A.

§ 1463. Mailing indecent matter on wrappers or envelopes.

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, and all postal cards upon which, any delineations, epithets, terms, or languauge of an indecent, lewd, lascivious, or obscene character are written or printed or otherwise impressed or apparent, are nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same,

shall be fined not more then $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

§ 1464 Broadcasting obscene language

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 769.

SEC. 259a, Chapter 6, Title 39, U.S.C.A.

§ 259a. Exclusion from mails of obscene, lewd, etc., articles, matters, devices, things, or substances

Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes. Aug. 16, 1950, c. 721, 64 Stat. 451.

BRIEF FOR THE UNITED STATES

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370701—56

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 555

ROBERT V. H. SUGDEN AND JEAN S. SUGDEN, HIS WIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 19–26; R. 89–95) is reported at 226 F. 2d 281.

JURISDICTION

The judgment of the Court of Appeals was rendered on September 30, 1955 (Pet. 27; R. 96) and a petition for rehearing was denied on November 10, 1955 (Pet. 29; R. 98). The petition for a writ of certiorari was filed on December 8, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the rule barring the use in evidence of information obtained by intercepting wire or radio communications applies, in a prosecution for violation of the immigration laws, to the use of information obtained by agents of the Federal Communications Commission in the course of monitoring radio communications sent by an unlicensed operator.

STATUTES INVOLVED

The pertinent provisions of the Federal Communications Commission Act of 1934, 48 Stat. 1064, c. 652, as amended, 50 Stat. 56, are as follows:

> Section 318 (47 U. S. C. 318):
>
> The actual operation of all transmitting appartus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: * * *
>
> Section 501 (47 U. S. C. 501):
>
> Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and know-

ingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

Section 605 (47 U. S. C. 605):

* * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *.

STATEMENT

Two indictments returned in the United States District Court for the District of Arizona charged (1) that petitioners from about August 23, 1953, to September 18, 1953, conspired to violate the immigration laws and (2) that petitioner Robert V. H. Sugden unlawfully concealed certain named aliens in violation of 8 U. S. C. 1324 (a) (3) (R. 3–10).[1]

Prior to trial, petitioners moved to suppress evidence obtained by the government through monitoring of petitioners' radio communications (R. 10–13). At the preliminary hearing the following evidence was adduced:

[1] In two additional indictments not involved in this petition the petitioners were charged with violations of the Communications Act by reason of their operation of a radio station without operators' licenses and in violation of the terms of the station license.

On August 27, 1953, petitioners obtained their Federal Communications Commission station license to operate a radio station which had just been installed in their home for use in connection with their farming activities (R. 62–64, 68, 71). They operated the station in August and September, although they did not secure their individual operator's licenses until September 17 (R. 47, 65, 68, 72, 74). The delay in securing their individual operator's licenses was due to their filing incompleted forms (R. 46).

Without petitioners' consent or knowledge, Robert J. Stratton, an engineer employed by the Federal Communications Commission, monitored petitioners' radio communications on September 4, 9, 10 and 18, 1953, upon the basis of a report from the Department of Justice that petitioners were using the radio for unauthorized purposes (R. 33–35). Mr. Stratton made notes and recordings of the communications, forwarded them to Washington and made them available to the United States Immigration Service (R. 37–39). He appeared before the grand jury which returned the present indictments and testified generally as to the monitored communications (R. 40). He also discussed the communications with the United States attorney in charge of the instant case (R. 42–43). The government's questioning of petitioners' former employees also involved the use of the monitored communications

(R. 49–51, 52–54, 58–59). The United States attorney stated that he made substantial use of the monitored communications in the preparation of the government's case (R. 61).

Petitioners testified that they relied on the Motorola representative who sold them the radio station to take care of everything, that he did not advise them that they could not operate the station without operator's licenses and that they were unaware of the necessity of having such licenses as a prerequisite to using the station (R. 62, 65, 72–73). However, radio technician Kieling of the local sheriff's office testified that early in August he warned petitioner Jean Sugden against the use of the station without an operator's license and left F. C. C. application forms with her to execute and mail (R. 76–78).

The district court ruled that all of the evidence and information obtained by monitoring should be suppressed. It also dismissed the indictments as having been "tainted" by use of the illegally obtained evidence before the grand jury. (R. 22–23.)

The Court of Appeals was of the view that, while monitoring of radio communications by agents of the Commission is lawful, disclosure of information so obtained is limited to enforcement of the Communications Act. But it held the prohibition against publication does not apply to messages sent by persons such as petitioners

who were operating without licenses. Hence, the court held that the monitored communications occurring before September 17, when petitioners received their licenses, were admissible in evidence before the grand jury and would be admissible at the trial. (R. 94–95.) It reversed the trial court's orders suppressing the evidence and dismissing the indictments and remanded to the trial court for further proceedings (R. 96).[2]

ARGUMENT

The court below based its reversal of the judgment of the district court on the narrow ground that radio communications sent by operators not licensed as required by the Federal Communications Act are not entitled to the protection of Section 605 of that Act, as interpreted by this Court in *Nardone* v. *United States,* 302 U. S. 379, and *Weiss* v. *United States,* 308 U. S. 321. If that decision is correct, as we submit it clearly is, there is no need even to reach the question which

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[2] With respect to the further proceedings, the court said (Pet. 25–26; R. 95):

"It is this court's view that the trial court should reexamine the motions of defendants on the basis that free use of any radio communications made before September 17th can be made. The district court will need a new hearing before ruling on the suppression of evidence and quashing the indictment. And possibly the court may want to exercise its power to open up the proceedings of the grand jury before it rules on dismissing the indictments. The last-mentioned matter will involve the use of a wise discretion, depending on how the hearing otherwise develops."

petitioners attempt to raise (Pet. 9–15) as to the extent to which employees of the Federal Communications Commission may monitor radio communications by licensed operators over licensed stations or the question of whether illegal activities discovered in the course of such monitoring may be divulged.[3] Our main discussion, therefore, is confined to that narrow issue, which is determinative of the instant case.

The *Nardone* principle which petitioners seek to apply here was not the result of a clear cut literal prohibition which was contained in the language of Section 605, but was the "translation into practicality of broad considerations

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[3] We agree with the court below that employees of the Commission do have the power to monitor communications by private operators and to utilize information so obtained in the enforcement of the Communications Act. But, contrary to the opinion below, we believe that if, in the course of bona fide legal monitoring, other illegal activities are uncovered, information with regard thereto may properly be divulged to the proper law-enforcement agencies. The situation, in our view, is the same as that presented where, in the course of a valid search, unsought evidence of another crime is uncovered. Such evidence may then properly be seized and used. *Harris* v. *United States*, 331 U. S. 145. Since, however, the decision of the court below remanding the case may result in the government's obtaining the use of all the evidence it needs in the present case, the issue was not deemed appropriate for review in this case. In the present posture of the case, the contention that all radio communications may be monitored and any illegal activities uncovered divulged represents an independent ground to support the decision below, one which for the reasons stated in the text we do not believe it is necessary for the Court to reach.